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Utah Supreme Court

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Recommended Citation
Brief of Appellant, *Sandy City v. Salt Lake County*, No. 900425.00 (Utah Supreme Court, 1990).
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UTAH SUPREME COURT

BRIEF

19385

IN THE UTAH SUPREME COURT

SANDY CITY, a municipal corporation, Plaintiff and Appellant, vs. SALT LAKE COUNTY, a political subdivision of the State of Utah, and the SALT LAKE COUNTY PLANNING COMMISSION, Defendants and Appellees.	:	CASE NO. 900425 CATEGORY NO. 16

BRIEF OF APPELLANT

ON WRIT OF CERTIORARI FROM A DECISION OF A PANEL OF THE UTAH COURT OF APPEALS AFFIRMING DISMISSAL OF THIS ACTION BY THE THIRD DISTRICT COURT

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FILED

MAR 29 1991

Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

SANDY CITY, a municipal corporation,	:	
Plaintiff and Appellant,	:	
vs.	:	
SALT LAKE COUNTY, a political subdivision of the State of Utah, and the SALT LAKE COUNTY PLANNING COMMISSION,	:	CASE NO. 900425
	:	CATEGORY NO. 16
Defendants and Appellees.	:	

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JURISDICTION

This action is before the Supreme Court on a Writ of Certiorari to review of a decision of a panel of the Court of Appeals consisting of Judges Bench, Garff, and Jackson (herein "Panel"). The Panel's decision affirmed dismissal of this action by the district court. It was filed June 7, 1990, and rehearing was denied August 6, 1990. The Supreme Court granted the City's Petition for Writ of Certiorari on December 12, 1991, pursuant to §78-2-2(5) of the Utah Code and Rule 46 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

The following issues are presented for determination:

1. Whether the lower courts misperceived legislative intent in construing applicable statutes and ordinances.

2. Whether the district court erred in upholding Salt Lake County development approvals.

3. Whether the appeal court panel erred in upholding the ruling of the district court.

DETERMINATIVE STATUTES, RULES, AND ORDINANCES
(With Emphasis Added)

Utah Statutes:

§10-2-401 The Legislature hereby declares that it is legislative policy that:

> (1) Sound urban development is essential to the continued economic development of this state;
>
> (2) *Municipalities are created to provide urban governmental services essential for sound urban development and for the protection of public health, safety and welfare in residential, commercial and industrial areas, and in areas undergoing development;*

(3) *Municipal boundaries should be extended, in accordance with specific standards, to include areas where a high quality of urban governmental services is needed and can be provided for the protection of public health, safety and welfare and to avoid the inequities of double taxation and the proliferation of special service districts;*

(4) Areas annexed to municipalities in accordance with appropriate standards should receive the services provided by the annexing municipality, subject to Section 10-2-424, as soon as possible following the annexation;

(5) *Areas annexed to municipalities should include all of the urbanized unincorporated areas contiguous to municipalities*, securing to residents within the areas a voice in the selection of their government;

(6) Decisions with respect to municipal boundaries and urban development need to be made with adequate consideration of the effect of the proposed actions on adjacent areas and on the interests of other governmental entities, on the need for and cost of local government services and the ability to deliver the services under the proposed actions, and on factors related to population growth and density and the geography of the area; and

(7) Problems related to municipal boundaries are of concern to citizens in all parts of the state and must therefore be considered a state responsibility.

§10-2-418 *Urban development shall not be approved or permitted within one-half mile of a municipality in the unincorporated territory which the municipality has proposed for municipal expansion in its policy declaration, if the municipality is willing to annex the territory proposed for such development under the standards and requirements set forth in this chapter*; provided, however, that a property owner desiring to develop or improve property within the said one-half mile area may notify the municipality in writing of said desire and identify with particularity all legal and factual barriers preventing an annexation to the municipality. At the end of 12 consecutive months from the filing with the municipality of said notice and after a good faith and diligent effort by said property owner to annex, said property owner may develop as otherwise permitted by law.

§10-1-104 (1) "*Municipal*" *or* "*municipalities*" means any city of the first class, city of the second class, city of the third class, or town in the state of Utah, but unless the context otherwise provides, *the term does not include counties*, school districts, or any other special purpose governments.

* * *

§10-1-104 (11) "*Urban development*" means a housing subdivision involving more than 15 residential units with an average of less than one acre per

residential unit or *a commercial* or industrial *development for which cost projections exceed $750,000 for any or all phases.*

§10-9-9 [Prior to 1989 Amendment] Appeals to the [city] board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the *municipality* affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time as provided by the rules of the board by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board of adjustment all the papers constituting the record upon which the action appealed from was taken.

§10-9-15 The *city* or any person aggrieved by any decision of the [city] board of adjustment may have and maintain a plenary action for relief therefrom in any court of competent jurisdiction; provided, petition for such relief is presented to the court within thirty days after the filing of such decision in the office of the board.

§17-27-16 Appeals to the [county] board of adjustment may be taken by any person aggrieved by his inability to obtain a building permit, or by the decision of any *administrative* officer or agency based upon or made in the course of the *administration or enforcement* of the provisions of the zoning resolution. Appeals to the board of adjustment may be taken by any officer, department, board or bureau of the county affected by the grant or refusal of a building permit or by other decision of an *administrative officer* or agency based on or made in the course of the *administration or enforcement* of the provisions of the zoning resolution. The time within which such appeal must be made, and the form or other procedure relating thereto, shall be as specified in the general rules provided in writing by the board of county commissioners to govern the procedure of such board of adjustment or in the supplemental rules of procedure adopted by such board provided further that said rules and regulations shall be available to the public at the office of the county commissioners at all times.

Upon appeals the board of adjustment shall have the following powers:

(1) To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by *administrative* official or agency based on or made in the *enforcement* of the zoning resolution.

(2) To hear and decide, in accordance with the provisions off any such resolution, requests for special exceptions or for interpretation of the map or for decision upon other special questions upon which such board is

authorized by any such resolution to pass.

(3) Where by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the enactment of the regulation, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon, the owner of such property, to authorize, upon an appeal relating to said property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning resolutions.

The concurring vote of four members of the board in the case of a five-member board, and of three members in the case of a three-member board, shall be necessary to reverse any order, requirement, decision or determination of any such administrative official or agency or to decide in favor of the appellant.

Salt Lake County Ordinance:

§19.84.090 *The planning commission shall not authorize a conditional use permit unless the evidence presented is such as to establish*:

A. That the proposed use at the particular location is necessary or desirable to provide a service or facility which will contribute to the general well-being of the neighborhood and the community; and

B. That such use will not, under the circumstances of the particular case, be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity; and

C. That the proposed use will comply with the regulations and conditions specified in this title for such use; and

D. *That the proposed use will conform to the intent of the county master plan.*

Rules of Civil Procedure:

Rule 56 This rule appears as Appendix "A" to this brief.

STATEMENT OF THE CASE

This action was filed in the Third District Court by Sandy City to challenge Salt Lake County approvals of a 4.18 acre commercial development in an unincorporated island within Sandy's boundaries. State statutes restrict projects in unincorporated areas which are adjacent to city boundaries if development costs exceed $750,000. Motions for summary judgment were filed by all parties in the district court. The City also moved to strike certain affidavits and documents and filed a Rule 56(f) affidavit in support of its request for additional discovery time. The City's motions were denied and summary judgment was entered for defendants.

A Panel of the Court of Appeals ("Panel") affirmed the trial court's judgment.[1] The Panel based its decision on an issue which had not been previously considered, briefed or argued. It erroneously concluded that the City had not properly appealed a County rezoning of the property. The Panel also applied a standard of review which gave undue deference to County discretion in determining its own jurisdictional limits. The City's Petition for Rehearing was denied.

RELEVANT FACTS

The following facts of record are unrefuted:

The Parties

1. Sandy City ("City") is a Utah municipality of the third class, created to provide urban governmental services essential for sound urban development and for the protection of public health, safety and welfare in residential, commercial and industrial

[1] The Panel's opinion is set forth in Appendix "B."

areas, and in areas undergoing development.[2] As a Utah city, Sandy has the full range of financial and statutory powers needed to provide these services within its existing boundaries and into annexing areas.[3]

2. Defendant Salt Lake County ("County") is a subdivision of the state of Utah, organized and functioning under authority of Title 17 Utah Code Anno. 1953.[4] Although it lacks the powers of a municipality, it is attempting to deliver municipal-type services under the theory that it is a "defacto city"[5].

3. Defendant County Planning Commission is a committee of County residents appointed by the County to approve unincorporated area development. Members of the commission are not required to possess training or experience of any sort and the record discloses no evidence of board expertise in development or land use planning.[6]

The Property and Its Authorized Uses

4. This action involves a single parcel of approximately 4.18 acres ("Property") located on the northwest corner of 10600 South and 1300 East, in unincorporated Salt Lake County.[7] The Property is located on the edge of an unincorporated island within the limits of the City such that it is separated from City limits only by 1300 East Street.

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[2] Record at 2; see also, UTAH CODE ANN. 10-2-401(2).

[3] UTAH CODE ANN. 10-2-401(2), (4).

[4] Record at 3.

[5] County brief in *Mountain States Tel. and Tel. Co. v. Salt Lake County*, 702 P.2d 113, p. 23.

[6] UTAH CODE ANN. 17-27-2.

[7] Record at 4.

5. The Developers purchased the Property in 1987 with the express intention to develop a multiphased "commercial subdivision."[8] The first phase was the Chevron service complex and the second phase was a McDonalds restaurant. There are also other phases of development on the Property. They have not been disclosed by the developers; however, costs of development in all phases will run to millions dollars.[9]

6. Since its adoption in 1976, the County master plan for the area has called for rural residential uses on the Property.[10] Sandy City plans also specify similar such uses.[11] The Property has historically been zoned Residential (R-1-8) consistent with both City and County plans,[12] however, since initiation of this action, it has been partially developed for commercial purposes contrary to the rural residential standard of these plans.

Annexation - First Step of the Approval Process

7. The City has adopted an Annexation Plan, consistent with its master plan, as required by state statute. The purpose of this plan is to officially declare the unincorporated areas which the City is able and willing to annex. The Property is within the area the City has agreed to annex under that plan.[13] The effect of adoption of the Annexation Plan is to prohibit County approval of commercial development in excess of

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[8] Record at 162,164.

[9] Record at 133-135.

[10] Record at 100, 165.

[11] Record at 239.

[12] Record at 100, 102.

[13] Record at 34, Transcript at 30.

$750,000[14] on the Property, unless the property owners have first attempted to annex to the City.[15]

8. It is undisputed that land costs alone for the site exceed $750,000. However, the developers did not attempt to annex.[16] Their apparent intention was to obtain more liberal zoning and development standards from Salt Lake County. Accordingly, they applied directly to the County for commercial zoning of the property -- thus avoiding an annexation hearing before the City, as called for at this stage of the development process.

Zoning - Second Step of the Approval Process

9. The County received the developers' zoning request on April 9, 1987.[17] The developers omitted the estimate of project value required on the application form; but they did admit that the rezoning would not comply with the County's current land use plan.[18]

10. There was substantial neighborhood resistance to the rezoning.[19] The developers made concessions to residential neighbors in order to minimize opposition.[20] One concession was to seal off the development from the unincorporated neighborhoods

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[14] This amount refers to "cost projections" for "any or all phases" of development. UTAH CODE ANN. 10-1-101(11).

[15] UTAH CODE ANN. 10-2-418.

[16] Record at 11.

[17] Record at 15.

[18] Record at 15.

[19] Record at 108, 163, 165.

[20] Record at 110, 246.

by an eight foot cinder block wall, so that it faced only Sandy City.[21] The owners also agreed that they would be the sole developers of the project and that all construction would proceed as a single development.[22] The owners were successful at overcoming some County and community resistance through this and other means.[23]

11. The County sent the City a copy of the rezoning application and requested its recommendation.[24] This correspondence omitted the estimate of project value but admitted noncompliance with the County's current land use plan then in effect.[25] The City filed a written objection to the rezoning stating that the rezoning would violate the City's Comprehensive Plan and Crescent Community Citizen's Report,[26] as well as the County's own Master Plan, and that "[t]he developer should seek annexation and zoning from Sandy."[27]

12. The County held a hearing on August 5, 1987, to consider the rezoning request. There is no record that the City received notice of the hearing and its representatives did not attend.[28] Nevertheless, the County Commission was briefed at the hearing on Sandy's objection to the rezoning.[29]

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[21] Record at 114-115, 167, 248.

[22] Record at 245.

[23] Record at 115.

[24] Record at 15-17.

[25] Record at 15.

[26] Record at 7.

[27] Record at 17.

[28] Although there is a record of constructive notice to the public. Envelope 5, Doc. 2.

[29] Envelope 5, document 6.

13. A simple sketch of the project site may have been available at the time of rezoning.[30] However, there was "not a specific use proposed for the overall properties" at the time the application was made or when rezoning was considered[31] and it would have been impossible for an estimate of the cost of development to be made at that time.[32] Nevertheless, the Deputy County Attorney advised the Commission that the project may exceed the $750,000 development limitation, depending on how the development plans were eventually presented. He concluded that "Sandy could object to that anyway," presumably when plans were submitted to obtain permits.[33]

14. On August 5, 1987, the County granted the developers' request and amended its zoning to allow commercial development (Commercial C-2 and Residential RM/zc) on the Property[34]. The new zones contain development standards which are substantially lower than permitted in Sandy City zones just across the street.[35] The County master plan was not amended to accommodate the new zone and continued to call for "rural residential" uses on the property.[36] The new zone likewise continued to contradict the City's Comprehensive Plan and Crescent Community Citizen's Report.[37]

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[30] Envelope 6 #21.

[31] Record at 15, Envelope 5, Document 6, p. 904.

[32] The proposal was so loose that County staff reported "there is a possibility that the developer will ask for a different zone depending on the market." The zoning was thereupon approved by the County Commission without any knowledge of actual uses to be placed on the property.

[33] Envelope 5, document 6, p. 906.

[34] Record at 18-19, 102-103.

[35] Record at 25, 109, and 114.

[36] Record at 100, 165.

[37] Record at 17.

The ordinance was published on August 20, 1987.[38]

15. The City learned of the rezoning and, within 30 days after publication, petitioned the County for a rehearing of its zoning decision.[39] That petition reiterated that "[d]evelopment on the property would constitute 'urban development' and that the property owners had not attempted to annex the property to Sandy City as required by §10-2-418 U.C.A. 1953." The petition also stated that "[t]he granting of the RM/zc and C-2 zoning contradicts the Little Cottonwood District Development Plan which calls for rural residential use on the property."[40]

16. The County Commission reviewed the City's petition but did not permit City representatives to speak.[41] The Commission denied the City's request and directed that if the City wished to pursue its objection, it should do so before the Planning Commission through the conditional use permit process.[42]

Conditional Use Permits - Third Step of the Approval Process

17. On August 26, 1987, Chevron's agent applied to Salt Lake County for a Conditional Use Permit for construction of the first phase of the development -- approximately .7 acres.[43] Such a permit is required by Salt Lake County ordinances for commercial development within this zone.[44]

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[38] Record at 19.

[39] Record at 25.

[40] Record at 25.

[41] Transcript at 6. Also, Envelope 5, Document 7, p. 1190. Compare with the Panel Opinion which asserts that Sandy had "ample opportunity to present evidence." p. 13.

[42] Envelope 5, Documents 8-9.

[43] Record at 20.

[44] Record at 21-22A.

18. The application proposed a service station, convenience store and car wash,[45] with a stated cost of $250,000.[46] However, the actual cost of the Chevron phase was $650,000 to $770,000, which included the price of the .7 acre Chevron pad, but did not include land or improvement costs for any other projects on the remaining 3.48 acres of the subdivision.[47]

19. On about September 30, 1987 (approximately one month after the first phase application), the property owners, through their agent, filed a second application for a conditional use. This application was for a McDonald's Restaurant to be located on the Property adjacent to and immediately to the north of the Chevron Center.[48] Neither McDonalds nor Chevron were owners of the property at the time of their applications or at any time during 1987.[49]

20. The application for this second phase (McDonalds Restaurant) specified the value of the project, including land, to be $300,000.[50] However, the stand-alone costs of the second phase were $900,000 to $1,100,000.[51]

21. The City protested to the Planning Commission raising repeated objections to the statutory and master plan violations described above.[52] On October 13, 1987, the

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[45] Record at 107, 181.

[46] Record at 20.

[47] Record at 108, 111, 133-135, 246-247.

[48] Record at 168.

[49] Record at 114, 1333-135, 247, 385, 308, 343, Transcript at 75-76.

[50] Record at 168.

[51] Record at 133-135.

[52] Record at 27-29.

County Planning Commission approved the conditional use application for the Chevron center, over objection by the City.[53] On October 14, 1987, Sandy City appealed that decision to the Salt Lake County Commission.[54] On October 21, 1988, the County Commission denied the City's request for appeal and upheld the Planning Commission decision.[55]

22. On October 27, 1987, the County Planning Commission approved the use application for the second (McDonalds) phase.[56] The City appealed that approval to the County Commission on November 4, 1987. On December 9, 1987, the County Commission denied the City's appeal and approved the conditional use application.[57]

Disposition in the District Court

23. On November 6, 1987, Sandy City filed a verified complaint in Third District Court challenging both the rezoning and the conditional use permits.[58] Such action was precisely the appeal process proposed by the County Attorney's Office.[59]

24. By letter dated November 19, 1987, the City Attorney inquired of counsel for the developers, of a convenient date for deposition of developer Yeates.

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[53] Record at 115.

[54] Record at 27.

[55] Record at 6.

[56] Record at 167.

[57] Record at 249.

[58] Record at 2

[59] "Mr. [Kent] Lewis responded if the conditional use is issued because they are convinced that it is not covered by the half-mile (sic), then Sandy's option is to seek an injunction agains(sic) the developer and the county and a legal determination could be made as to whether or not the half mile is applicable." Envelope 5, Document 9, p. 1114.

Defendant's counsel did not respond to that inquiry.[60] Instead, all defendants filed motions for summary judgment. On January 26, 1988, the City responded with its own motion for summary judgment. Motions by the City and Chevron were accompanied by affidavits and memoranda. The City filed a motion to strike portions of affidavits and other documents and filed a four page affidavit of counsel evidencing the need for additional discovery time.[61]

25. On February 5, 1988, the Court heard the motions for summary judgment and a motion to strike. After counsel for the City had completed oral argument, counsel for the County submitted several stacks of documents to the court. The County evidence was submitted without prior notice to the City. It was received by the Court over objection by the City and without a showing of good cause.[62]

26. On February 25, 1988, Salt Lake County filed a motion to certify the record which it had filed with the Court at the hearing on summary judgment, together with supplemental related documents, which motion was granted.[63]

27. On March 15, 1988, the Court filed its memorandum decision denying the City's motion for summary judgment and motion to strike and granting defendants' motions for summary judgment and Salt Lake County's motion for certification. On April 8, 1988, the Court entered its formal order and judgment of dismissal, which order forms the basis of this appeal.[64]

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[60] Record at 202.

[61] Record at 173-178, 198-206.

[62] Transcript at 21-30, 74-75.

[63] Record at 225-258.

[64] Record at 259-263. The decision and order are at Appendix "C."

28. On April 28, 1988, the City filed a motion for injunction during pendency of appeal.[65] The motion was based in part on affidavits showing that the Property Owners had conveyed the Property to Chevron and McDonalds after the motions for summary judgment had been heard[66] and that development was occurring on the Property. That motion was denied[67] and the City appealed on May 5, 1988.

Disposition before the Appeal Court

29. On June 7, 1990, a Panel of the Court of Appeals affirmed the trial court's judgment on grounds which had not been previously considered, briefed or argued.[68] The Panel found that the City had not judicially appealed the County rezoning of the property prior to the County's conditional use approval. A Petition for Rehearing by the City was denied on August 6, 1990.

30. The City's petition for writ of certiorari was granted on December 12, 1991. Thereafter, the defendant property owners petitioned for annexation to Sandy City. All defendants except the County and its planning commission were accordingly dismissed from this action.[69] The City asserts no further claims against the annexing owners.

SUMMARY OF THE ARGUMENT

Both the District Court and the Court of Appeals have ruled in this action. Their holdings were inconsistent; however, they both have found means to summarily approve

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[65] Record att 334.

[66] Record at 324,327.

[67] Record at 339.

[68] The Panel's opinion is set forth in Appendix "B."

[69] County Brief in Opposition to Petition for Writ of Certiorari, Exhibit F.

development, despite the obvious issues of fact and the prohibitive statutes, ordinances and rules which bar such approvals.

The Court of Appeals decision is particularly detrimental, since it departed from both the facts and law argued by the parties and relied on by the lower court. This detour from the refining process of briefing and argument resulted in several errors of fact and law which, if not corrected, will undermine effective urban planning and promote future litigation between local governments.

The hesitation of these courts to address the merits of the action may have arisen from a belief that judgment for the City would require the developers to dismantle their projects. Accordingly, the City has stipulated to the dismissal of each of the private parties to this action, in order to avoid distraction from the critical legal and public policy issues which are described below.

ARGUMENT

POINT I

THE LOWER COURTS MISPERCEIVED LEGISLATIVE INTENTS

A. LAND USE PLANS WERE IGNORED

The pioneering spirit which accounted for development of this country had less to do with individual heroic acts than with the effectiveness of clusters of people gathered for simple purposes. Chances of frontier survival could be measured less by loner courage than by how well undertakings were planned and groups were organized.[70]

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[70] Boorstin, *The Americans: the National Experience*, pp. 51-65, 1965. Mr. Boorstin was Senior Historian at the Smithsonian Institution, then Librarian of Congress from 1975 to 1987, where he is now Director Emeritus.

Good planning and organizing is difficult in local government today. Our elective system generates sudden changes in leadership at policy-making levels and impedes consistent long-term planning. State and local legislative bodies have recognized this problem and, through statute and ordinance, devised ways to encourage sound urban planning.

In Utah, most urban planning takes place on a specific, i.e., local, level. In fact, Utah cities are required by statute to adopt comprehensive plans for future development and to conform their zoning regulations to such plans.[71] Sandy City has adopted such a plan. Even Salt Lake County, although not a municipality, has adopted an ordinance requiring that the development subject to this action be consistent with its master plan.[72]

As discussed hereafter, the County approvals subject of this action violated the County's own master plan and the City's comprehensive plan. The lower courts found procedural excuses for failing to consider these violations or even permit discovery concerning them. In so doing, they implied a simple planning model. That model casts land use planning as perfunctory -- an academic exercise without practical significance. The model ignores the enormous development problems growing within our urban areas and the significant role planning must play in the solution to America's problems of pollution, overcrowding and natural resource destruction.

Comprehensive plans are not clerical niceties -- they are necessary to sound urban planning. By failing to respect urban planning, the lower courts became instruments to undermine principles critical to the safety and welfare of the public.

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[71] UTAH CODE ANN. 10-9-3, 10-9-21. See *Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704, 711 (1943).

[72] Record at 22. Section 19.84.090(D), Revised Ordinances of Salt Lake County.

B. PLANNING MECHANISMS WERE SUPPLANTED.

Local government is sometimes preferred in Utah as government "close to the people." However, from a planning perspective, the multiplication of many local governments complicates coordination of development between jurisdictions.

Interlocal coordination of urban planning has been addressed differently by state. Devices which have been used include: (1) regional planning commissions; (2) extraterritorial control by cities; (3) intergovernmental agreements; (4) governmental consolidation; (5) special service districts; and (6) annexation.[73]

In 1979, the Utah Legislature selected municipal annexation as the principle means of solving this coordination problem. It declared that cities should provide urban services to developing areas and that annexation is the means by which those services should be extended.[74] The Legislature also determined that islands of unincorporated territory surrounded by municipal boundaries are impediments to sound service delivery and should be annexed to cities.[75]

In embracing annexation as a development process, the Legislature also granted cities two additional tools for coordinating development, both of which involve extraterritorial control. First, city annexations must be preceded by a "policy declaration" or plan applying state standards in determining the unincorporated areas best suited for annexation and development.[76] Second, counties and special districts are expressly prohibited from approving urban development in any such planned area if it is

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[73] Goodman, *Principles and Practice of Urban Planning*, pp. 32-36, (1968).

[74] UTAH CODE ANN. 10-2-401.

[75] UTAH CODE ANN. 10-2-401(5) and 10-2-417(1)(d).

[76] UTAH CODE ANN. 10-2-414.

within one-half mile of a city.[77]

This combination of advance planning, extraterritorial control, and municipal annexation, are the means the state has provided to coordinate development between local governments. They are not academic exercises; the Legislature has determined that they are practical and necessary to sound urban development.[78]

In this case, the lower courts effectively vitiated Legislative development controls by approving large scale urban development within an unincorporated island of Sandy City lying within the area of the City's annexation plan. These decisions not only slighted City and County master plans, they also vitiated interlocal coordination. This failure to uphold planning statutes and ordinances offends Legislative prerogatives and leave local governments without mechanisms needed to effect approved principles of sound urban development.

C. FAULTY GOVERNANCE MODELS WERE EMBRACED

Salt Lake County contends that it is a "defacto city"[79] and that it has all the powers of a city.[80] The Court of Appeals embraced this model, assuming that powers of cities and counties are interchangeable and freely apply provisions of the Utah Municipal Code to County procedures. These conclusions about the nature of Utah local government and their powers are superficial and erroneous.

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[77] UTAH CODE ANN. 10-2-418.

[78] UTAH CODE ANN. 10-2-401. The Legislature is hostile to the use of certain other development coordination devices such as "the proliferation of special service districts." *Id.*

[79] County Brief in *Mountain States*, at 23.

[80] County Brief in Opposition to Petition for Writ of Certiorari, at 8, footnote 5.

Cities have broad powers to deliver and finance municipal services -- counties do not. There are historic differences in the roles of cities and counties.[81] Rural areas generally take the name of county or township and are chiefly administrative subdivisions of the state.[82] The Utah legislature assigns cities a very different role -- that of urban service delivery. Cities are expected to annex all of the urbanized unincorporated areas contiguous to municipalities in order that full urban services can be efficiently delivered:

> Municipalities are created to provide urban governmental services essential for sound urban development and for the protection of public health, safety and welfare in residential, commercial and industrial areas, and in areas undergoing development.
>
> * * *
>
> Areas annexed to municipalities should include all of the urbanized unincorporated areas contiguous to municipalities . . .[83]

Salt Lake County recognizes that it lacks the powers of a city -- but claims such powers anyway. It argues that it is a "defacto city" and on this basis has entered into competition with local cities for delivery of municipal services. Serious intergovernmental conflicts result from this practice. They include the following:

1. Service Delivery Impediments. Despite its lack of municipal powers, Salt Lake County has elected to sponsor large-scale unincorporated development -- often along and within city boundaries and islands. Because cities cannot annex so as to create more unincorporated islands,[84] county-approved developments, which resist annexation, can restrict annexation along the entire length of a city boundary.

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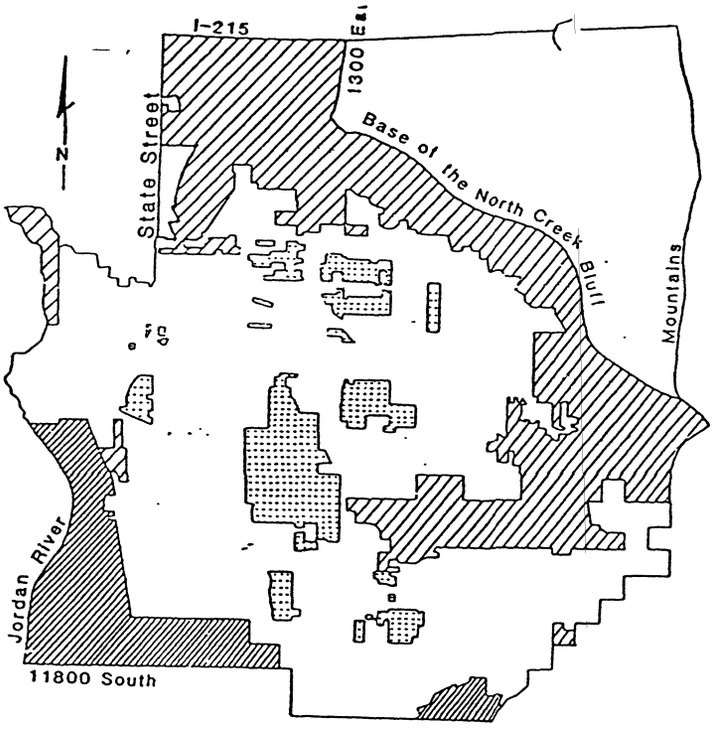
[81] *Mountain States, supra.*

[82] 1 McQuillin, Municipal Corporations 22 (3d ed. 1988).

[83] UTAH CODE ANN. 10-2-401(2), (5).

[84] UTAH CODE ANN. 10-2-417(1)(d).

The impact of County competition for territorial control of development is probably best illustrated in Sandy City's own erratic boundaries and in the numerous unincorporated islands within that City:



[85]

The urban development which is subject to this action was approved by the County within one of these unincorporated islands and is marked in red above. There is an obvious inefficiency of servicing central Sandy locations from remote County facilities. This practice also encourages developers to shop within such islands for the

[85] Record at 25.

most attractive zoning and development standards -- annexing where city standards are favorable and "going unincorporated" where, as in most cases, County standards are lower. As this process occurs, power over local planning subtly shifts into private hands where interests are largely site-specific. The long-term effect is ad hoc planning and frustration of the objectives of local communities as they try to plan for its growth and efficiently deliver services to their citizens.

When developers are able to pit cities against the County along municipal boundaries to see which will offer the lowest development standard in exchange for tax base, comprehensive urrban planning is destroyed. Uses of land, such as those at issue, which do not conform to the comprehensive plans of the community, have been a source of deep concern to legislators and planners. These nonconforming uses limit the effectiveness of land-use controls and share responsibility for the blight which has infected many urban areas.[86] Municipal attorneys,[87] urban planners,[88] and law review commentators[89] agree that nonconforming uses imperil the success of community plans and injure property values.

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[86] 1 R. Anderson, *American Law of Zoning*, Vol. 1, p. 357 (2d ed.).

[87] Messer, *Non-conforming Uses, Municipalities and the Law in Action*, at 347 (1951).

[88] Lewis, *A New Zoning Plan for the District of Columbia*, at 112 (1956).

[89] Young, Regulation and Removal of Nonconforming Uses, 12 *Western Reserve Law Review* 681 (1961); Comment, 7 *Baylor Law Review* 73 (1955); Comment, 102 *University of Pennsylvania* 91 (1953); Comment, 1 *Buffalo Law Review* 286 (1952); Comment, 9 *University of Chicago Law Review* 477 (1942); Mendelker, Prolonging the Nonconforming Use; Judicial Restriction on the Power to Zone in Iowa, 8 *Drake Law Review* 23 (1958); Norton, Elimination of Nonconforming Uses and Structures, 20 Law & Contemporary Problems 305 (1955); O'Reilly, The Nonconforming Use and Due Process of Law, 23 *Georgetown Law Journal* 218 (1935); *Summary of Utah Law: Land Use, Zoning and Eminent Domain*, BYU Journal of Legal Studies, 151 (1979).

2. Service District Proliferation. Additional problems result from County development policies. The county lacks the constitutional and statutory authority of a city and can't meet the full service demands of unincorporated areas. So it has encouraged the creation of special purpose districts to help compete with cities for development.

The proliferation of special districts defeats representative government. Districts exercise limited functions and operate apart from general units of government. The territorial jurisdiction of districts often overlap, creating difficult problems particularly in metropolitan areas.[90] For these reasons, special district governance has been aptly termed the "new dark continent of American politics."[91]

The Salt Lake Valley poses the most serious problem in Utah. At least twelve full-function cities and towns exist in the valley. Salt Lake County also engages in the delivery of municipal services. Nevertheless, at least nineteen special purpose districts have been organized to duplicate municipal functions and complicate the local government puzzle:

> The anomalous result is the existence of thirty-one units of local government attempting to meet the needs of an area whose topography is uniform and whose population is constantly becoming more evenly distributed as suburbanization makes its rapid advance.[92]

3. Taxation Excesses and Inequities. Taxation excesses are of paramount public concern. The roots of local taxation problems lie within this maze of governments and service delivery roles:

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[90] Robert W. Swensen, A Primer of Utah Water Law: Part II, 1985 *Utah Law Review* 1, 48.

[91] See discussion in Benson, "Special Districts and Deficient Local Government in the Salt Lake Metropolitan Area," 7 *Utah Law Review* 209, 212-126 (1960).

[92] *Id.*

> Are there any logical bases for dividing into special districts governmental functions and responsibilities in a relatively compact area such as the Salt Lake Metropolitan Area, where nearly half of Utah's population is concentrated? A few examples from the report of the Local Government Survey Commission, which recently completed a factual study of local government structure in Utah, provide the obvious answer. Unnecessary expenses are incurred because special districts employ their own legal counsel, thereby duplicating functions of the city or county attorney's office. Expenses are further increased because there is no central purchasing authority, and, consequently, none of the economies of large-scale purchasing are realized. Duplicate purchases of equipment and the necessary maintenance facilities as well as duplication of personnel also increase costs. Taxpayers in some instances are subject simultaneously to as many as five local government authorities. In such confusion taxpayers sometimes do not even receive the specific service the district is supposed to provide. For example, in the suburban area southeast of Salt Lake City, taxpayers have to purchase water from ten private water companies, as well as from Salt Lake City, and at the same time are taxed by the Salt Lake County Water Conservancy District, from which they receive no water. The compilers of the report felt that the latter situation was "close to double taxation," and the inequality of the situation does seem obvious."[93]

In 1979, the Utah Legislature declared its intention to eliminate these governmental disorders in the following statement of policy:

> The Legislature hereby declares that it is legislative policy that:
> (1) Sound urban development is essential to the continued economic development of this state;
> (2) *Municipalities are created to provide urban governmental services essential for sound urban development and for the protection of public health, safety and welfare in residential, commercial and industrial areas, and in areas undergoing development;*
> (3) *Municipal boundaries should be extended, in accordance with specific standards, to include areas where a high quality of urban governmental services is needed and can be provided for the protection of public health, safety and welfare and to avoid the inequities of double taxation and the proliferation of special service districts;*
> (4) Areas annexed to municipalities in accordance with appropriate standards should receive the services provided by the annexing municipality, subject to Section 10-2-424, as soon as possible following the annexation;
> (5) *Areas annexed to municipalities should include all of the urbanized*

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[93] *Id.*, at 212.

unincorporated areas contiguous to municipalities, securing to residents within the areas a voice in the selection of their government;
(6) Decisions with respect to municipal boundaries and urban development need to be made with adequate consideration of the effect of the proposed actions on adjacent areas and on the interests of other governmental entities, on the need for and cost of local government services and the ability to deliver the services under the proposed actions, and on factors related to population growth and density and the geography of the area; and
(7) Problems related to municipal boundaries are of concern to citizens in all parts of the state and must therefore be considered a state responsibility.

This important policy directly addresses the problem of competition by counties for new development. It emphasized that urban development is the responsibility of municipalities, which have the statutory authority to provide a full range of urban services. Municipal annexation is defined as the means to promote such policy and eliminate the evils of service district proliferation and double taxation.

This policy was accompanied by the introduction to a comprehensive planning law. This new law was unlike prior planning statutes in that it finally addressed the problem of competition between cities and counties for urban development. Central to that new law is §10-2-418, which states that "[u]rban development shall not be approved or permitted within one-half mile of a municipality in the unincorporated area which the municipality has proposed for municipal expansion in its policy declaration."[94]

The effect of this statute is to restrict counties from expanding their tax base adjacent to cities and in unincorporated islands and thus reopen such territories to annexation. Although this policy does not implement all aspects of legislative policy in a single stroke, it at least limits growth of the problem and begins a critical evolution away

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[94] "Urban development" is defined to include "a commercial or industrial development for which cost projections exceed $750,000 for any or all phases." UTAH CODE ANN. 10-1-104(11).

from self-destructive intergovernmental competition.

Salt Lake County rejects responsibility for the governance confusion which afflict the Salt Lake Valley. It contends that it has all the powers of a city and shows no inclination to bend to the spirit or the letter of the Urban Development Statute. It intends to continue fighting city development. Its principle stratagem is to denude the urban development statute by means of a restrictive definition of "development."

Obviously, revenue-conscious counties can't be expected to enforce the urban development statute on their own.[95] To be effective, this restriction must be judicially honored. Without such aid from the courts, legislative intentions will be vitiated while service delivery is retarded, urban planning is frustrated, service districts proliferate, and taxation inequities continue unabated.

The Appeal Court Panel missed the distinction between cities and counties. In fact, it applied the Utah Municipal Code to county rezonings. It further ruled that cities cannot object to county approval of urban development adjacent to their boundaries unless they have previously exhausted an attack on the underlying zoning.[96]

The Panel misconstrued the record in concluding that the City did not appeal the County's rezoning decision.[97] It also made legal errors. But, most important, the decision bypassed the opportunity to support statutes and legislative policies which hold the key to sound development. Instead, the Panel effectively redefined the urban development statute to permit any unincorporated development on previously zoned

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[95] See *Salt Lake City v. Salt Lake County*, 568 P.2d 738 (Utah 1977) (tendency of county to maximize revenues in its own self-interest).

[96] *Sandy City v. Salt Lake County*, 794 P.2d 482, 491 (Utah App. 1990).

[97] See discussion under Point III.

land regardless of its cost or scale.

Cities presented with this new requirement will be powerless to comply, since most county lands are already zoned. Even with new zoning proposals, the development is often not defined so as to give cities a factual basis upon which to conclude that costs will exceed the $750,000 jurisdictional limit. Cities will, nevertheless, be required to file suit against most county rezonings in order to preserve their rights to question subsequent development approvals.

The Panel's misperceptions creates impossible barriers to enforcement of the urban development statute in a manner which robs it of its intended meaning. The effect of its decision is to undo the express language of a statute of critical importance to the welfare of our state.

POINT II

THE DISTRICT COURT ERRED IN UPHOLDING COUNTY DEVELOPMENT APPROVALS

A. STATUTES WERE MISCONSTRUED

UTAH CODE ANN. §10-2-418, strictly limits County approval of urban development within one-half mile of a city in unincorporated territory which the city has proposed for annexation in its policy declaration. That statute states:

> *Urban development shall not be approved or permitted within one-half mile of a municipality in the unincorporated territory which the municipality has proposed for municipal expansion in its policy declaration, if the municipality is willing to annex the territory proposed for such development under the standards and requirements set forth in this chapter*; provided, however, that a property owner desiring to develop or improve property within the said one-half mile area may notify the municipality in writing of said desire and identify with particularity all legal and factual barriers preventing an annexation to the municipality. At the end of 12 consecutive months from the filing with the municipality of said notice and after a good faith and diligent effort by said property owner to annex, said property owner may develop as otherwise permitted by law. [Emphasis added]

The above statute prohibits county approval of unincorporated "urban development" if 1) it is within one-half mile of Sandy City, 2) the City has proposed the area for expansion in its policy declaration, and 3) Sandy is willing to annex the territory proposed for the development.

It is undisputed that the Property in this action is within one-half mile of Sandy and that Sandy has proposed the area for expansion in its policy declaration.[98] The district court, nevertheless, erroneously concluded that the Property could be developed without annexing under the following reasoning:

"Willingness" of City to Annex. The District Court erroneously concluded that §10-2-418 requires a City to publicly declare its "willingness" to annex a property in advance of annexation.[99] However, the statute does not require such a declaration. All it requires is that the City be "willing to annex the territory proposed for [urban] development *under the standards and requirements set forth in this chapter.*"

The phrase "under the standards and requirements set forth in this chapter" modifies the phrase "willing to annex" and no other modification of the phrase "willing to annex" appears in the provision. Thus, it is clear that the Legislature did not her impose upon cities an affirmative duty to express formally by specific city ordinance or otherwise a willingness to annex. The Legislature simply requires that cities be willing to annex according to state annexation standards.

This brief later demonstrates that the City repeatedly declared its willingness to annex the Property. However, such was not required. Further, by ignoring the plain

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[98] Record at 34.

[99] Record at 260.

wording of the statute, the district court created a barrier to annexation by other cities which was never intended by the legislature. In so doing, it erred as a matter of law which error requires reversal on appeal.

Definition of "Urban Development." The District Court also concluded that annexation was not required because the Property was not "urban development." "Urban development" is also defined in statute. Section 10-1-104(11), Utah Code Annotated (1953) defines the term as follows:

> ". . . a housing subdivision involving more than 15 residential units with an average of less than one acre per residential unit or a commercial or industrial development for which cost projections exceed $750,000 for any or all phases."

The District Court erred twice in its construction of this statute. First, the Court assumed that the value of building fixtures should not be considered in determining cost projections. Second, the court erroneously assumed that each pad within a project constitutes a separate development.

Costs for a "development" include all expenses from land acquisition to the finished project. The Utah Supreme Court has defined the term "develop" to mean "the converting of a tract of land into an area suitable for residential or business uses."[100] In fact, "development" includes "any or all undertakings necessary for planning, land acquisition, demolition, construction, or *equipment of a project.*"[101]

The district court's rejection of fixtures as development costs excludes many true expenses of the Chevron Service Center including installation of curb, guttering and sidewalks, underground fuel storage tanks, petroleum piping and monitoring systems,

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[100] *Scheller v. Dixie Six Corporation*, 753 P.2d 971.

[101] Dumonuchel Dictionary of Development Terminology, 1975 [emphasis added].

construction of a carwash, finishing, equipping, landscaping and installing sprinkling systems, signing and lighting, hard surfacing, etc.

The court's suggestion that development costs include only building shells is also inconsistent with Utah law and appraisal practices which have long included true fixtures as a part of realty. In order to ascertain whether an improvement has been made to real estate, courts look to whether there has been an annexation to the land, or to some part of the realty; or a fixture appurtenant to it, and whether it was done with the intention of making it a permanent part thereof.[102]

The court also directly contridicted the statute in concluding that only the first phase of a development in calculating total development costs. The statutory definition of "urban development" includes "all phases" of a development. In including "all phases" in the definition, the legislature wisely anticipated the kind of development being considered in this case--one which is developed in multiple phases. This language is designed to prevent a developer, as in this case, from circumventing the development statute by simply segmenting or timing his projects.

B. FICTIONS WERE INDULGED

Judge Uno's Memorandum Decision did not just misconstrue the law. It relied on a series of four express misstatements of fact as follows:

1. Master Plan.

The district court concluded that "Salt Lake County Commission acted properly in rezoning the property in question, and *was not in violation of any county ordinance or*

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[102] *Daniels v. Deseret Federal Sav. & Loan*, 771 P.2d 1100, 1103 (Utah Ct. App. 1989).

county master plan, and did not act arbitrarily and capriciously."[103] This conclusion contradicts the undisputed record. The County approved commercial zoning in an area designated by its master plan for "rural residential uses." The County's own ordinance specifically requires compliance with that plan. That ordinance states:

> "The planning commission shall not authorize a conditional use permit unless the evidence presented is such as to establish . . . [t]hat the proposed use will conform to the intent of the county master plan."

The Utah Supreme Court has ruled that the failure of an agency of government to conform its official actions to its own regulations is arbitrary and capricious. The Court has said:

> Defendants contend that the procedural rules are merely "guidelines," but administrative regulations are presumed to be reasonable and valid and cannot be ignored by the agency to suite its own purposes. *Such is the essence of arbitrary and capricious action.* Without compelling grounds for not following its rules, an agency must be held to them.[104]

The deputy county attorney advised the County Commission that "conditional uses need be consistant always with the master plan."[105] That advice was ignored. The County's failure to require compliance with its master plan, in the face of clear evidence of noncompliance, was the essence of capriciousness and is the cause of this otherwise unnecessary legal action. The district court's conclusion to the contrary is purely fictional.

2. Willingness to Annex.

The district court erred in concluding that "Sandy City has not clearly stated it would annex the subject property." Assuming *arguendo* that such a declaration is

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[103] Record at 259.

[104] *State, Etc. v. Utah Merit System Council*, 614 P.2d 1259, 1263 (Utah 1980).

[105] Record at 243.

required, the Court of Appeals in this action refutes that conclusion. It recognized that the City had posed at least two bases on which to show "willingness:" (1) promulgating a general policy declaration indicating its willingness to annex the property, if petitioned, along with twenty other parcels; and (2) its counsel's direct statement to the Salt Lake County Planning Commission that it was willing to annex the property."[106]

The evidence referenced by the court of appeals was before the district court in this action. The City's declaration could not be clearer or more specific. The City directly and publicly reiterated its willingness to annex the entire 4.18 acre tract:

> Walter Miller, Sandy City Attorney, expressed thoughts on annexation of properties within a mile of a city, etc. He stated that the project is in excess of $750,000 and *Sandy City is willing to annex this territory. If the applicant had petitioned Sandy for annexation they would have accepted*, but he did not and this is a major concerrn for the City from a legal as well as a planning point of view.[107]

The district court's conclusion that no willingness was expressed offends the express language of the statute which requires no such expression. It also contradicts the record on appeal which demonstrates at least two discrete occasions when the City publicly declared its willingness. Assertions to the contrary by the district court cannot be supported legally or factually and are entirely fictional.

3. Development Costs.

Sandy introduced, before the district court, an appraisal by a licensed MAI showing costs of "development" exceeded $750,000. The County's own Director of Development Services confirmed that development costs for the Property would exceed

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[106] *Sandy City v. Salt Lake County*, 794 P.2d 482 (Utah Ct. App. 1990).

[107] Record at 109, 246.

the $750,000 figure.[108] The District Court ignored this expert testimony by pretending that costs of development relate only to the shell of buildings. It stated that "[t]he value of the fixtures and personal property should not be considered [in determining development costs]."

At hearings before the County Commission, counsel for the County repeatedly referred to its improvements as "fixtures" and "fixture costs." This is undoubtedly because they help to make the building "operational." Salt Lake County appraises improvements as part of its tax appraisals on homes and other real property. It sees no reason to exclude the value of fixtures from such real estate appraisals and there is no reason to exclude such here.

The court should not have permitted the County to alternate between restrictive and expansive standards of real estate appraisal, in each case simply to maximize its tax revenues. Where improvements have been affixed to property in order to render it operational, such fixtures should be included in the costs of development.

4. Scope of Development.

The district court also triedd to limit the scope of the development to the Chevron phase alone in order to lower the calculation of development costs. It stated that "[t]he application of Chevron should be considered a single development." The record does not support this conclusion.

There is no evidence that the Chevron phase was platted separately from the balance of the subdivision. On the contrary, the facts before the court were that the whole 4.18 acres were under single ownership and that the entire tract, including

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[108] Record at 111. Also envelope 4, docuument 6, p. 13.

Chevron and McDonalds, was a single "commercial subdivision." The owners of the entire tract promised the public that they would be the sole developers of the project and that all construction would proceed as a single development.[109]

Chevron did not acquire ownership of the parcel until approximately five months after the conditional use permit was approved.[110] Motions for summary judgment had been heard one month prior to conveyance to Chevron. Chevron impliedly admits that it did not acquire control over the design and development of its station until that time.[111]

The district court had no factual basis to conclude that the Chevron Center was a seperate development from the rest of the site. Its decision should be reversed.

C. DISCOVERY WAS NOT PERMITTED

A motion for summary judgment should not be granted when the nonmoving party has not completed discovery because further discovery may disclose issues of material facts sufficient to defeat the motion.[112]

The party opposing summary judgment must file an affidavit evidencing the need for further discovery.[113] The City filed the affidavit of its counsel with the trial court previous to the hearing on the motions for summary judgment. The four-page affidavit and exhibit stated, among other things, that the City was unable, after request, to take

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[109] Record at 245.

[110] Record at 343. See also, envelope 4, #3.

[111] Chevron appeal brief, p. 18.

[112] *Strand v. Associated Students of University of Utah*, 561 P. 2d 191 (Utah 1977); *Callioux v. Progressive Insurance*, 745 P. 2d 838 (Utah App. 1987).

[113] *Jackson v. Layton City*, 743 P. 2d 1196 (Utah 1987).

the deposition of the defendants and was unable, after several requests, to obtain a certified copy of certain County Commission minutes. The affidavit stated further the precise issues of material fact the City expected to discover.[114]

The district court refused to permit the City to take depositions of defendants or conduct other discovery as requested by the City through affidavit of its counsel under authority of Rule 56(f) of the Utah Rules of Civil Procedure. The court abused its discretion in granting the Appellees' motion for summary judgment in view of the City's detailed affidavit. This error alone is sufficient to justify reversal the district court's ruling.

POINT III

THE APPEAL COURT PANEL ERRED IN UPHOLDING THE DISTRICT COURT

A. AN ERRONEOUS STANDARD OF REVIEW WAS APPLIED

1. The Panel Failed to Recognize the Jurisdictional Nature of the Urban Development Statute.

UTAH CODE ANN. §10-2-418 (1986) states that "[u]rban development shall not be approved or permitted within one-half mile of a municipality in the unincorporated area which the municipality has proposed for municipal expansion in its policy declaration." "Urban development" is defined to include "a commercial or industrial development for which cost projections exceed $750,000 for any or all phases."[115]

The central issue in this action has been whether respondents' development exceeded $750,000 in costs so as to deprive the County of approval authority. The County Director of Development Services, testifying before the Planning Commission,

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[114] Record at 198-203. A copy of the affidavit is at Appendix "D."

[115] UTAH CODE ANN. 10-1-104(11) (1986).

confirmed that "when the entire site is developed it will exceed the $750,000 figure."[116] Developers testifying at that same hearing confirmed that their costs for just the first two pads was $760,000.[117] A later MAI appraisal showed that the costs of the entire development indeed far exceeded the $750,000 urban development restriction.[118]

Thus, the evidence before the County was entirely consistent -- as it is before this Court -- the costs of the entire project will exceed $750,000. Despite the testimony of the developers and its own staff, it found that development costs were less than $750,000.

On appeal, the Panel acknowledged that it could consider whether the County exceeded its authority under the Urban Development Statute, but refused to do so.[119] It cited *Naylor v. Salt Lake City Corporation*[120] for the proposition that the Panel should not substitute its judgment for that of the County on the merits of such an issue.

The *Naylor* case does not support such a conclusion. The statutory authority of the City was not in question there. The Utah Supreme Court recognized that "[t]he statutory authority of the City's governing body to enact zoning ordinances and amending the same is not questioned" in that case.[121] The *Naylor* court merely confirmed that courts should not ordinarily interfere with matters of administrative discretion.

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[116] Record at 111.

[117] Record at 108.

[118] Record at 133-135.

[119] Opinion, p. 11.

[120] 16 Utah 2d 192, 398 P.2d 27, 28-29 (Utah 1965).

[121] *Id.*, at p. 28.

2. The Court Applied a Standard of Review Applicable to Discretionary Decisions by Local Governments and Not to Questions of Local Government Jurisdiction.

Statutory authority is the central issue in this appeal. Jurisdictional issues are not discretionary and judicial deference has no proper place where the County lacks authority to act. The Utah Supreme Court has confirmed that review latitude is recognized only where counties act within their authority:

> "County zoning authorities are bound by the terms and standards of the applicable zoning ordinances, and are not at liberty either to grant or deny conditional use permits in derogation of legislative standards. *Within the boundaries established by such standards*, however, the zoning authority is afforded a broad latitude of discretion, and its decisions are afforded a strong presumption of validity. Where such decisions have been made, courts will not interfere unless they are plainly illegal, arbitrary, unreasonable or an abuse of discretion."[122]

The review standard applied by the Panel reverses the proper role of the courts. Instead of serving as a check on governmental excesses, they become the validators of the same. It permits administrative agencies to define their own powers in the face of evidence which consistently denies them such powers. The Panel could not have intended to play such a role or create such a profound precedent. The City requests that this Court consider the review standard the Panel so broadly applied in this appeal.

B. NONAPPLICABLE STATUTES WERE HELD DETERMINATIVE

1. The Municipal Code has No Application Whatsoever to County Rezonings.

The court cited two statutes selected from the Utah Municipal Code as a basis for its refusal to review the merits of this appeal. These statutes have no application to this appeal for the following reasons:

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[122] *Thurston v. Cache Cty*, 626 P.2d 440, 444-445 (Utah 1981). Emphasis added. See also *Peatross v. Board of County Commissioners*, 555 P.2d 281 (Utah 1976), where the Court made clear that deference will be granted under the "arbitrary and capricious" standard only if the lower agency was "acting within the scope of its authority."

UTAH CODE ANN. §10-9-9. This statute was cited by the Court as a basis for its conclusion that the City did not timely appeal the County's zoning decision.[123] This section is part of the Utah Municipal Code. It establishes a procedure for appeals to *city* board of adjustments from administrative decisions by *city* officials.[124] It has nothing to do with County zonings whatsoever. The County has its own zoning statutes which differ from those applicable to cities.[125]

The respective statutes dealing with cities and counties are not interchangeable. The Legislature and Supreme Court have been continuously clear "that the respective statutes dealing with cities and counties confer different powers."[126] The Utah Municipal Code should not be applied to county zonings.[127]

Even if this section were somehow to relate to counties, it does not apply here. It addresses only to appeals from *enforcement* decisions and does not authorize the board of adjustment to invalidate the actual zones themselves. Further, this section does not establish any time limits whatsoever for appeals. It is facially inapplicable to this action and should not be used as the basis to avoid consideration of the merits of this appeal.

UTAH CODE ANN. §10-9-15. This statute was also apparently used to establish that the City had failed to make a timely administrative appeal from the County's

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[123] Opinion, p. 43.

[124] UTAH CODE ANN. 10-9-6(2) and 10-9-9(1).

[125] UTAH CODE ANN. 17-27-1 et seq.

[126] *Mountain States, supra.*

[127] See *Davis County v. Clearfield City*, 756 P.2d 704, 706-707 (Utah Ct. App. 1988), where the Court of Appeals rejected a similar attempt to impute the provisions of the Utah Administrative Procedures Act to municipal planning matters.

rezoning.[128] This section does set a 30-day appeal period -- but it is for appealing decisions by *city* boards of adjustments *to the district court*. Like section 10-9-9, it is part of the Utah Municipal Code and applies only to cities. Counties are not municipalities for the purposes of the Code and this section has nothing to do with County zoning decisions whatsoever.[129] Even if it did apply to counties, it does not purport to establish a time-limitation for appeals of rezoning decisions.

2. The Board of Adjustment Statutes Relied on by the Court Have Do Not Govern Rezoning Decisions by Elected County Officials.

Section 17-27-16 of the enabling act for counties was also cited by the Panel to establish that an appeal from a zoning decision must be made within the time and according to the procedure specified by the board of county commissioners.[130] As discussed in Section C below, the City precisely followed County directions in appealing the rezoning decision.

Section 17-27-16 actually provides a procedure for appealing alleged errors in zoning enforcement decisions to the board of adjustment. The record does not disclose whether Salt Lake County has ever appointed a board of adjustment. If it has, that board does not review rezonings.[131] Its powers are expressly limited to considering alleged errors "in the *enforcement* of the zoning resolution."[132]

The City does not challenge zoning *enforcement*. It attacks the jurisdiction of the

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[128] Opinion, p. 39.

[129] UTAH CODE ANN. 10-1-104(1).

[130] Opinion, footnote 1.

[131] Zoning is generally considered to be an act which is legislative in nature. *Walton v. Tracy Loan & Trust Co.*, 97 Utah 249, 92 P.2d 724, 725 (1939); *Gayland v. Salt Lake County*, 11 Utah 2d 307, 358 P.2d 633, 635 (1961); *Crestview-Holladay Homeowners Ass'n v. Engh Floral Co.*, 545 P.2d 1150, 1152 (Utah 1976).

[132] UTAH CODE ANN. 17-27-16(1). Emphasis added.

County *to adopt* the zone itself. Such challenges to the validity of ordinances do not require appeal to the board of adjustment:

> Since the board of adjustment does not have the authority to invalidate ordinances, challenges to the validity of ordinances do not require appeal to the board of adjustment. Such appeal would be futile and therefore unnecessary.[133]

Section 17-27-16 has no application to the County's rezoning decision and should not have been applied to avoid consideration of the merits of this appeal.[134]

C. THE FACTUAL RECORD WAS MISSTATED

1. Objections to Rezoning. The Appeal Court's decision acknowledges that Sandy objected to the County's rezoning but erroneously states that "there is no dispute that Sandy City failed to appeal the rezoning" pursuant to §17-27-16. That conclusion arose partly from the lack of briefing or argument and the misconstruction of §17-27-16 discussed above. However, a misunderstanding of the factual record is also implied in the conclusion.

The undisputed facts demonstrate that (1) the City raised its development objections prior to the County's rezoning hearing; (2) evidence of development costs was not available to the City at the time of rezoning and could not have accompanied the City's objection; (3) at the time of rezoning, the County understood that the project may violate urban development restrictions; (4) the County nevertheless rezoned the property, deferring its decision on the legal question and the City's objection to the development until a specific development was proposed; (5) the City timely requested

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[133] *Summary of Utah Law: Land Use, Zoning and Eminent Domain*, Brigham Young University Journal of Legal Studies, at 207, (1979).

[134] *Thurston, supra*, p. 446, confirms that the board of adjustment is not "the exclusive repository of appellate powers."

reconsideration of the County's decision; (6) the request for zoning reconsideration was denied and the City was directed to pursue its objection through the conditional use process; (7) the City complied with the County's direction and fully participated at all stages of the conditional use process as defined by ordinance; and (8) through this action, the City timely appealed both the rezoning and conditional use permits in the manner defined by the County Attorney.

Thus, the City was not remiss in raising objections or untimely in appealing this development. The court's decision that the City should have followed some alternative appeal procedure is contrary to the procedures outlined by the County to the City orally in the record and by ordinance. The City followed all those procedures and made its objections in a timely fashion at each stage.

Where the parties have agreed on an appeal procedure which is consistent with all applicable statutes and ordinances, it promotes unfairness to refuse rudimentary discovery and, in fact, to invalidate an action on the basis that an alternative procedure was not selected. The Court would advance justice by providing the same presumption to the County's defined grievance procedure as the Panel did to all other aspects of the County's decisions. The Panel's decision should be corrected to reflect the actual record of these events and the merits of the City's appeal should be addressed in that process.

2. Adequacy of County Findings.

The Court of Appeals refused to consider any factual issues because the County had made findings as to development costs which were "supported by evidence."[135] This conclusion is inaccurate. As stated above, the County's own staff testified that

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[135] Opinion, p. 14.

development costs for the site would exceed $750,000:

> "Ken Jones, Director of Development Services, said in the past the County has not considered the value of the land because this varies from day to day, however, the value of the development is determined when the building permit is acquired. He would not want his staff to advise people to purchase a 10 acre parcel, get it zoned, and then cut it up to avoid annexation. *In this particular case it is safe to assume that when the entire site is developed it will exceed the $750,000 figure.* This legal issue will have to be addressed with the cooperation of Salt Lake County and Sandy City."[136]

The developers confirmed that they were in fact cutting up the parcel and that their costs for just the first two of numerous building pads was $760,000.[137] No evidence was introduced to refute this testimony.[138] The County's findings therefore directly contradict the undisputed evidence and the appeal court's deference to such findings was misplaced. The court's decision should be reconsidered in order to state the facts contained in the record on appeal.

Point IV

PUBLIC POLICY MITIGATES FOR REVERSAL OF SUMMARY JUDGMENT

The following are among the numerous public policy factors which each mitigate in favor of summary judgment for the City:

1. Respect of Legislative Prerogatives. The Utah Legislature has expressed its desire to strictly limit urban development in unincorporated areas surrounding cities.

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[136] Record at 111. Also, Envelope 4, Document 6, p. 13.

[137] Envelope 4, Document 6, p. 10.

[138] Record at 108. Chevron agents did make statements as to costs on the first pad. However, they did not address costs for the entire development. Further, such statements were without foundation and the County's findings even as to that pad violated the "residuum of competent evidence rule." Utah courts have held that a residuum of competent legal evidence must support findings of an administrative agency. *Kehl v. Schwendiman*, 735 P.2d 413, 415 (Utah App. 1987).

The reasons for these restrictions are express and sound. They include the fact that (1) cities are created to provide the high quality of urban governmental services needed for sound development[139] -- counties are not; (2) development within the unincorporated areas of the county is a cause of "double taxation" of city residents, an "inequity" which the Legislature is attempting to eliminate;[140] and (3) because counties are not empowered to provide full urban services, unincorporated development encourages the "proliferation of special service districts," which activity the Legislature is likewise attempting to discourage.[141]

Because county governments are less able to regulate urban development, developers have commonly sought to develop in unincorporated areas, thus avoiding more comprehensive review of their projects. Salt Lake County has encouraged such developments because development enlarges county tax base, patronage, and political influence. However, such activities are directly contrary to the legislative policy expressed in the statutes discussed above.

Due respect for the legislative prerogative in lawmaking requires that the judiciary support enactments of the Legislature where disagreement is founded only in policy considerations and the legislative scheme employs reasonable means to effectuate a legitimate objective.[142] Respect for legislative intentions mitigates in favor of a ruling requiring the developers and county to comply with the urban development restrictions of state statute.

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[139] UTAH CODE ANN. 10-2-401(3).

[140] Id.

[141] Id.

[142] *Utah Technology Finance Corp. v. Wilkinson*, 39 Utah Advance Reports 15, 19 (1986)

2. Balancing of Interests. Defendants' development does not just bring into conflict the interests of Salt Lake County and Sandy City. Their development is posed directly adjacent to residential neighborhoods where residents and property owners have met and expressed strong views both for and against the development. Further, the property abuts two major arterial streets, and thus poses potential traffic problems for both Sandy City and Salt Lake County.

Orderly administrative procedures, whose proper purpose is the final settlement of controversies, is favored by the courts.[143] State statute provides a process whereby such disputes may be resolved -- it begins with the annexation process. Through that process, public hearings are held, citizens are heard, service delivery efficiencies can be maximized, and competing interests can be accommodated.

The Utah Supreme Court has ruled that city government is an appropriate forum for balancing interests and resolving disputes between residents and developers.[144] This Court should likewise give deference to the statutory annexation process in order that these policies may be effectuated.

3. Balance of Powers Principles. The Utah Supreme Court has asked trial courts to refer questions, that are properly committed to other branches of government, to the appropriate administrative process, in order that the powers of other branches of government will not be impinged.[145] The process which has been defined for resolving this dispute is the annexation process.

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[143] *Bandy v. Century Equipment Co., Inc*, 692 P.2d 754 (Utah 1984)

[144] *Loveland v. Orem City*, 70 Utah Adv. Rep. 2, 7 (1987)

[145] *Society of Professional Journalists v. Bullock*, 65 Utah Advance Reports 8, 11-12 (1987)

This Court will promote balance of powers principles by requiring defendants' compliance with the annexation process, which process is defined and executed through the legislative powers of this state.[146]

CONCLUSION

The following relief is requested:

1. For the reasons set forth above, as a matter of law, summary judgment should not have been granted in favor of defendants. This action should, therefore, be reversed on appeal and remanded to the district court in order that discovery may proceed.

2. The Appeal Court Panel's detour from the refining process of briefing and argument resulted in several errors of fact and law. That decision should be vacated.

3. Important questions of municipal law and urban development policy remain which should be settled. The Supreme Court should rule on the obligation of Salt Lake County to abide by the urban development statute and its own master plan. The Court should also correct Panel's statement of the standard of review as applied to County urban development decisions.

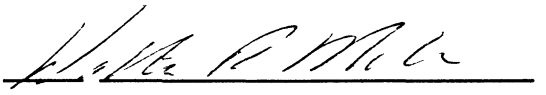
DATED this 27th day of March, 1991.

Walter R. Miller
Sandy City Attorney

[146] *Freeman v. Centerville City*, 600 P.2d 1003, 1004 (Utah 1979)

MAILING CERTIFICATE

I hereby certify that I mailed 4 copies of the foregoing Brief of Appellant to David E. Yocom and Kent S. Lewis, Attorneys for Defendants and Appellees, 2001 South State Street, #S3600, Salt Lake City, Utah 84190-1200 with postage prepaid this 28th day of March, 1991.



APPENDIX "A"

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX "B"

SANDY CITY, a municipal corporation, Plaintiff and Appellant,

v.

SALT LAKE COUNTY, a political subdivision of the State of Utah; Salt Lake County Planning Commission; K. Delyn Yeates; R. Scott Priest; W. Scott Kjar; Steven E. Smoot; Postero-Blecker, Inc.; and Chevron U.S.A., Inc., Defendants and Appellees.

No. 880429-CA.

Court of Appeals of Utah.

June 7, 1990.

Municipal corporation brought action against county, developers and property owners challenging issuance of conditional use permit to allow service station to be built on rezoned property. The Third District Court, Salt Lake County, Raymond S. Uno, J., dismissed city's action, and city appealed. The Court of Appeals, Garff, J., held that allowing administrative record to be submitted at hearing for motion for summary judgment rather than beforehand was not abuse of discretion; (2) affidavits produced in support of motion for summary judgment had adequate evidentiary foundations; (3) city was not entitled to motion for continuance to obtain further discovery; and (4) as result of failure to object to urban development at time of zoning determination, city was precluded from raising issue on appeal.

Affirmed.

Bench, J., concurred in result.

1. Appeal and Error ⇐934(1), 1024.4

In reviewing summary judgment, appellate court considers evidence in light most favorable to losing party and affirms only if it appears that no genuine dispute exists as to any material issues of fact or, if moving party is entitled to judgment as matter of law, even according to facts as contended by losing party.

2. Zoning and Planning ⇐618

Courts of law cannot substitute judgment in area of zoning regulations for that of municipality's governing body.

3. Zoning and Planning ⇐601, 614

Courts will not consider wisdom, necessity, or advisability or otherwise interfere with municipality's zoning determination unless it is shown that no reasonable basis to justify action taken exists.

4. Zoning and Planning ⇐642

If administrative record of zoning procedure has been preserved, matter will be reviewed on record and de novo trial is inappropriate. U.C.A.1953, 10-9-15.

5. Zoning and Planning ⇐625

Any error in admitting administrative record of zoning procedure during hearing on motion for summary judgment, rather than before, was harmless because record was essentially cumulative with respect to evidence already before court.

6. Zoning and Planning ⇐643

Admitting administrative record of zoning procedure at time of trial was within discretion of trial court, absent showing that party lacked actual notice and time to prepare to meet questions raised by admitted documents. Rules Civ.Proc., Rule 6(d).

7. Judgment ⇐185.1(8)

Affidavit which does not meet requirements for admission as evidence is subject to motion to strike since inadmissible evi-

dence cannot be considered in ruling on motion for summary judgment. Rules Civ. Proc., Rules 6(d), 56, 56(e).

8. **Judgment** ⇐185.3(1)

Affidavits presented by county in support of granting conditional use permit were admissible as portions of administrative record before county planning commission and were not subject to motion to strike. Rules Civ.Proc., Rule 56(e, f); Rules of Evid., Rules 902(4), 1005.

9. **Judgment** ⇐186

Motions under rule allowing court to continue summary judgment motions to permit moving party to obtain further discovery should be granted liberally to provide adequate opportunity for any genuine issues of fact to be discovered; further discovery, however, will not be allowed if parties did not diligently pursue discovery. Rules Civ.Proc., Rule 56(f).

10. **Judgment** ⇐186

In order to be entitled to continuance of summary judgment motion to complete discovery, movant must file affidavit to preserve contention that judgment should be delayed pending further discovery, which affidavit must explain how requested continuance would aid opposition to summary judgment. Rules Civ.Proc., Rule 56(f).

11. **Judgment** ⇐186

Evidence presented in affidavit in support of motion to continue summary judgment motion to allow further discovery indicated further discovery would produce only cumulative evidence and that movant lacked due diligence, and, thus, movant was not entitled to continuance. Rules Civ. Proc., Rule 56(f).

12. **Zoning and Planning** ⇐644

Evidence in zoning record supported findings that projected cost of development project and proposed development were in compliance with county master plan and county ordinances.

13. **Zoning and Planning** ⇐572

Even though city in master policy declaration had indicated interest in annexing property if property owners petitioned, property owners never petitioned nor did city attempt to annex property on its own, and, thus, city was precluded from raising annexation issue. U.C.A.1953, 10–2–414, 10–2–418, 10–9–9.

14. **Zoning and Planning** ⇐572

Municipal corporation failed to object to urban development at time zoning determination was made and, thus, was precluded from challenging issuance of conditional use permit under development. U.C.A. 1953, 10–1–104, 10–1–104(11), 10–2–414, 10–2–418.

Walter R. Miller, Sandy, for plaintiff and appellant.

Brinton R. Burbidge, Kirton, McConkie & Bushnell, Salt Lake City, for defendants and appellees Yeates, Priest, Kjar, Smoot and Postero–Blecker, Inc.

Leonard J. Lewis, Salt Lake City, for defendant and appellee Chevron U.S.A., Inc.

Kent S. Lewis, Salt Lake City, for defendant and appellee Salt Lake County.

Before BENCH, GARFF and JACKSON, JJ.

OPINION

GARFF, Judge:

Plaintiff Sandy City appeals the trial court's dismissal of its action against defendants Salt Lake County, property owners Yeates, Priest, Kjar, and Smoot, and developers Postero–Blecker, Inc. (Postero–Blecker) and Chevron USA, Inc. (Chevron). We affirm the trial court's dismissal of Sandy City's action.

This action involves a 4.18–acre parcel of commercial property located on the northwest corner of 10600 South and 1300 East in unincorporated Salt Lake County. The property abuts Sandy City's boundaries and is located within an unincorporated "island" within Sandy City's limits. Since 1976, the county master plan and Sandy City plans have called for rural residential uses of the property.

In 1979, Sandy City adopted a general annexation policy declaration which, among other things, delineated twenty-one unincorporated islands within the city boundaries which Sandy City was willing to annex, including the present parcel. According to Sandy City, this policy declaration requires property owners to first attempt to annex to Sandy City, thereby obviating the County's approval for development of commercial property when the development cost is in excess of $750,000.

On August 5, 1987, at the property owners' request, the Salt Lake County Commission, without amending its master plan, adopted a zoning ordinance which permitted commercial development on the present property. Sandy City objected to the rezoning but failed to appeal the decision.[1]

On August 26, 1987, Postero–Blecker, the agent for the property owners and Chevron, applied to Salt Lake County for a conditional use permit to build a Chevron service station, car wash, and mini-convenience store on .7 acres of the property. This application indicated that the estimated value of the project was $250,000. The property owners also intended to build a McDonald's restaurant on the property. On September 30, 1987, they filed another conditional use permit application which valued the McDonald's project at approximately $300,000. The property owners did not petition to annex the property to Sandy City.

On September 18, 1987, Sandy City protested the Chevron application, indicating that "Sandy City is currently considering annexation of the property and the annexation will require an independent consideration of proper zoning for this property." It also unsuccessfully petitioned the Salt Lake County Commission to reconsider and amend its previously passed zoning ordinance.

On October 13, 1987, the Salt Lake County Planning Commission approved the Chevron conditional use application. On October 14, 1987, Sandy City appealed this decision. The Salt Lake County Planning Commission, following several public hearings, denied Sandy City's appeal and entered findings of fact.

Sandy City then appealed the conditional use decision to the Salt Lake County Commission, which held a hearing on December 9, 1987. The Salt Lake County Commission affirmed the Salt Lake County Planning Commission's grant of the Chevron conditional use permit, finding that the required statutory procedure had been followed and that the grant of the conditional use permit was in the community's interest. Sandy City then brought this action in the district court.

On January 18, 1988, Salt Lake County filed with the district court the affidavit of Helen Christiansen, the Salt Lake Planning Commission's administrative assistant, and the minutes of the Salt Lake County Planning Commission's September 22 and October 13, 1987 meetings, at which Chevron's conditional use permit application had been discussed and interested parties had presented evidence. Subsequently, Sandy City submitted an affidavit indicating that the projected cost of the Chevron development was between $660,000 to $760,000 and that the cost of the McDonald's development would be between $900,000 and $1,100,000. Simultaneously, Salt Lake County submitted the minutes of the April 28, 1987 meeting of the Salt Lake County Planning Commission, which involved discussion of the zoning change, along with Helen Christiansen's authenticating affidavit. All parties moved for summary judgment.

Sandy City then moved to strike Salt Lake County's affidavits, alleging that they failed to conform to the requirements of rule 56(e) of the Utah Rules of Civil Procedure. Chevron responded by filing an affidavit indicating that the building value of the proposed Chevron station was $175,000.

1. Under Utah Code Ann. § 17-27-16 (1987), an appeal from a zoning decision must be made within the time and according to the procedure specified by the board of county commissioners. While these regulations are not a part of this record, there is no dispute that Sandy City failed to appeal the rezoning pursuant to these regulations.

On February 4, 1988, the day before the hearing on Salt Lake County's motion for summary judgment, Sandy City's attorney moved for additional discovery time pursuant to rule 56(f) of the Utah Rules of Civil Procedure.

During the hearing on February 5, 1988, Salt Lake County requested permission to introduce into evidence the certified record of the administrative hearings. These records included the previously submitted commission minutes, with additional maps and supporting materials. Sandy City's counsel objected, stating that he did not know what the administrative record contained and, thus, the record was prejudicial. The district court overruled Sandy City's objection and allowed the record to be entered into evidence. On February 19, 1988, Salt Lake County submitted the minutes of the December 9, 1987 meeting of the Salt Lake County Commission, containing the appeal of the conditional use permit grant, along with the administrative assistant's supporting affidavit.

Salt Lake County filed the complete certified administrative record with the district court on March 3, 1988. On March 15, 1988, the district court entered its decision, finding that the Salt Lake County Planning Commission had properly issued the conditional use permit, and that defendants' actions did not violate the annexation statute, Utah Code Ann. § 10–2–418 (1986). It granted summary judgment in favor of defendants and dismissed Sandy City's action. Subsequently, Sandy City unsuccessfully moved for an injunction on the development of the property during the pendency of the appeal. It then brought this appeal.

On appeal, Sandy City challenges the summary judgment, first arguing that there were substantial issues of material fact making summary judgment improper because: (1) Salt Lake County untimely submitted the administrative record in violation of rule 6(d) of the Utah Rules of Civil Procedure; (2) Salt Lake County's administrative record and affidavits were untimely filed in violation of rule 56 of the Utah Rules of Civil Procedure; (3) the affidavits and other evidence presented by Chevron violated rule 56(e) of the Utah Rules of Civil Procedure by lacking an adequate evidentiary foundation; (4) the trial court erred in refusing to grant Sandy City's rule 56(f) motion for further discovery; and (5) there were substantial issues of material fact in the record. Sandy City's second major assignment of error is that the trial court erroneously interpreted Utah Code Ann. §§ 10–2–418 and 10–1–104(11) (1986) by ruling that (1) to preclude urban development of the property at issue, Sandy City had to formally declare its intention to annex it prior to the occurrence of the events leading to this lawsuit, and (2) the Chevron development, and possibly the McDonald's development, did not constitute "urban development" under section 10–1–104(11).

I. FACTUAL AND EVIDENTIARY ISSUES

Before we address Sandy City's contentions, however, it is necessary to examine the scope of our review in cases dealing with summary judgment and municipal zoning issues.[2]

[1] In reviewing a summary judgment, an appellate court "consider[s] the evidence in the light most favorable to the losing party, and affirm[s] only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law." *Briggs v. Holcomb*, 740 P.2d 281, 283 (Utah Ct.App. 1987).

[2, 3] It is well established in Utah that "courts of law cannot substitute their judgment in the area of zoning regulations for that of the [municipality's] governing body." *Naylor v. Salt Lake City Corp.*, 16 Utah 2d 192, 398 P.2d 27, 29 (1965) (footnote omitted). Instead, the courts afford a comparatively wide latitude of dis-

2. Sandy City relies upon annexation statutes and characterizes some of the issues as annexation-related, however this appeal is from the grant of a conditional use permit, a zoning function.

cretion to administrative bodies charged with the responsibility of zoning, as well as endowing their actions with a presumption of correctness and validity, because of the complexity of factors involved in the matter of zoning and the specialized knowledge of the administrative body. *Cottonwood Heights Citizen Ass'n v. Board of Comm'rs*, 593 P.2d 138, 140 (Utah 1979). Thus, the courts will not consider the wisdom, necessity, or advisability or otherwise interfere with a zoning determination unless "it is shown that there is no reasonable basis to justify the action taken." *Id.*

[4] In a zoning action, Utah Code Ann. § 10-9-15 (1986) indicates that an aggrieved party may "maintain a plenary action for relief" from any decision of the municipal body within thirty days of the filing of the decision. The Utah Supreme Court stated that "[t]he statutory language 'plenary action *for relief therefrom*' presupposes the continued existence of the administrative action, thus suggesting an appeal rather than a trial de novo." *Xanthos v. Board of Adjustment*, 685 P.2d 1032, 1034 (Utah 1984). However, "[t]he nature and extent of the review depends on what happened below as reflected by a true record of the proceedings, viewed in the light of accepted due process requirements." *Denver & Rio Grande W. R.R. Co. v. Central Weber Sewer Improvement Dist.*, 4 Utah 2d 105, 287 P.2d 884, 887 (1955). The supreme court also found, in *Xanthos*, that where a hearing has proceeded in accordance with due process requirements, the reviewing court can look only to the record, which consists of the hearing minutes along with the formal findings and order. *Xanthos*, 685 P.2d at 1034. However, where no record is preserved, and there is, consequently, nothing to review, the reviewing court may take evidence. *Id.* While this evidence is not necessarily limited to the evidence presented below, the reviewing court may not retry the case on the merits or substitute its judgment for that of the municipal body. *Id.*

Because an administrative record has been preserved in the present circumstance, we find that this matter should be reviewed on the record, and that a de novo trial is inappropriate.

Under these standards of review, we now examine Sandy City's claims that the trial court improperly granted summary judgment on evidentiary issues.

A. Admission of Administrative Record

First, Sandy City alleges that Salt Lake County untimely submitted the administrative record in violation of rule 6(d) of the Utah Rules of Civil Procedure. It argues that rule 6(d) requires supporting affidavits to be submitted at the time a party files a motion for summary judgment, and that the administrative record is analogous to a supporting affidavit. Because the County submitted the administrative record during the hearing on the motion for summary judgment, rather than beforehand, and, consequently, failed to give Sandy City notice of the contents of the record, Sandy City concludes that the trial court should not have considered the evidence contained in this record in arriving at its summary judgment. On the other hand, the County argues that the Rules of Civil Procedure do not set forth any specific procedure for certifying an administrative record from a county commission to the district court, so rule 6(d) is inapplicable here because it deals only with the filing of affidavits.

In relevant part, rule 6(d) states:

> When a motion is supported by an affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

[5] Prior to the hearing before the district court on February 5, 1988, the County submitted the minutes of the Salt Lake County Planning Commission hearings held on April 28, May 12, September 22, October 13, and October 27, 1987, along with authenticating affidavits. These minutes contained testimony on all of the disputed issues. The record which the County moved to be placed into evidence during the district court hearing contained these minutes,

accompanied by some documentation and a large quantity of plat maps, but did not add materially to the relevant information already before the court. The court admitted this record into evidence over the strenuous objections of Sandy City, stating that "everything down there is not essential to a determination of these motions. And I think that quite apart from this, [even] if the court disregarded this, it will have before it sufficient undisputed facts of law to make decisions in the matter." Subsequently, the court admitted into evidence, as part of the record, the minutes of the Salt Lake County Commission hearing held on December 9, 1987, which had not previously been available, and various documents that were specifically requested by Sandy City's attorney.

Our review of the record, including the administrative record submitted to the court, indicates that if there was any error in admitting the administrative record, it was harmless because it was essentially cumulative with respect to the evidence already before the court. Further, some of the subsequently admitted evidence was admitted at Sandy City's request.

[6] However, we find that the trial court did not err in admitting the administrative record at the time of trial. If we follow rule 6(d) literally, styling the administrative record as the equivalent of an affidavit in support of a motion for summary judgment, the documents must be served not later than one day before the hearing unless the court permits them to be served at some other time. The court, therefore, has discretion to admit such documents at other times, including during the hearing. In this case, the court admitted documents during and after the hearing, in response to requests made by both parties.

However, there are limitations to this discretion. Although the Utah Supreme Court has found that the notice provisions of rule 6(d) are not hard and fast, it has stated that a trial court may dispense with technical compliance to them only if there is satisfactory proof that a party had "actual notice and time to prepare to meet the questions raised by the motion of an adversary." *Jensen v. Eames*, 30 Utah 2d 423, 519 P.2d 236, 238 (1974) (footnote omitted); *see also Western States Thrift & Loan Co. v. Blomquist*, 29 Utah 2d 58, 504 P.2d 1019, 1021 (1972); *Bairas v. Johnson*, 13 Utah 2d 269, 373 P.2d 375, 378–79 (1962).

Although Sandy City objected to the admission of the administrative record on the ground that it did not know what it contained and, therefore, was unprepared to argue against it, the trial court properly denied this objection because the entire record was a matter of public record, had been on file for a substantial period of time prior to the hearing, and both parties had access to it. Further, significant portions of the record, in the form of the commission minutes, were already before the court and Sandy City had ample opportunity to become familiar with them. We find no abuse of discretion in the court's ruling.

B. Adequate Evidentiary Foundation

Sandy City's next claim of error is that the affidavits and other evidence presented by Chevron and the other defendants violate rule 56 of the Utah Rules of Civil Procedure because they lacked an adequate evidentiary foundation.

[7] The relevant portion of rule 56(e) states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Inadmissible evidence cannot be considered in ruling on a motion for summary judgment, *D & L Supply v. Saurini*, 775 P.2d 420, 421 (Utah 1989); *Creekview Apartments v. State Farm Ins. Co.*, 771 P.2d 693, 695 (Utah Ct.App.1989); so an affidavit which does not meet the requirements of rule 56(e) is subject to a motion to strike. *Howick v. Bank of Salt Lake*, 28 Utah 2d 64, 498 P.2d 352, 353–54 (1972); *see also Blomquist*, 504 P.2d at 1020–21 (an affidavit containing statements made only "on information and belief" is insufficient and will be disregarded).

Sandy City moved to strike defendants' affidavits for their failure to conform to these requirements. In its motion to strike, Sandy City attacked defendant Chevron's memorandum in support of its motion for summary judgment and the affidavit of Helen J. Christiansen, along with its attached exhibits, to the extent that they were used to establish the allegations set forth in Chevron's memorandum.

[8] Helen J. Christiansen's affidavits served to establish that she was the custodian of the record before the Salt Lake County Planning Commission and that, on the basis of her personal knowledge, the hearing minutes and a copy of McDonald's Corporation's application for a conditional use permit were the correct records of the Salt Lake County Planning Commission. Under rules 902(4) and 1005 of the Utah Rules of Evidence, public records are admissible as an exception to the general rule excluding hearsay evidence if they are "certified as correct by the custodian." Utah R.Evid. 902(4). Therefore, Ms. Christiansen's affidavit conformed to rule 56(e) with regard to the admission of the exhibits as portions of the administrative record before the Salt Lake County Planning Commission. As such, they are admissible evidence and are not subject to a motion to strike.

Sandy City challenges various statements made in these minutes as being without evidentiary foundation. These allegations, however, go to the merits of granting the conditional use permit and not to any procedural defects. Therefore, we are not concerned with them under our standard of review. Consequently, we find Sandy City's objections to the foundation of statements made in the record to be without merit.

C. Further Discovery

[9] Sandy City argues that the district court erred in refusing to permit it to conduct further discovery pursuant to rule 56(f) of the Utah Rules of Civil Procedure. Rule 56(f) provides that a court may continue a motion for summary judgment to permit the moving party to obtain affidavits or take depositions. *Hunt v. Hurst*, 785 P.2d 414, 416 (Utah 1990). Rule 56(f) reads as follows:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

It is generally held that rule 56(f) motions should be granted liberally to provide adequate opportunity for discovery, *Cox v. Winters*, 678 P.2d 311, 313 (Utah 1984), *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 841 (Utah Ct.App.1987) because information gained during discovery may create genuine issues of fact sufficient to defeat a motion for summary judgment. *Downtown Athletic Club v. Horman*, 740 P.2d 275, 278 (Utah Ct.App.1987). However, courts are unwilling to "spare the litigants from their own lack of diligence," *Callioux*, 745 P.2d at 841 (quoting *Hebert v. Wicklund*, 744 F.2d 218, 222 (1st Cir.1984)), so do not grant rule 56(f) motions when dilatory or lacking in merit. *Reeves v. Geigy Pharmaceutical, Inc.*, 764 P.2d 636, 639 (Utah Ct.App.1988); *Downtown Athletic Club*, 740 P.2d at 278–79.

[10] A rule 56(f) movant must file an affidavit to preserve his or her contention that summary judgment should be delayed pending further discovery. *Callioux*, 745 P.2d at 841. In this affidavit, the movant must explain how the requested continuance will aid his or her opposition to summary judgment. *Id.* The trial court has discretion to determine whether the reasons stated in a rule 56(f) affidavit are adequate. *Reeves*, 764 P.2d at 639.

[11] Sandy City filed an affidavit with the court along with its rule 56(f) motion, stating that it had been unable to take defendants' depositions or to obtain a certified copy of certain county commission minutes. It indicated that it wanted to pursue additional discovery which would show that: (1) the proposed use of the

property contradicted the county master plan and that insufficient evidence had been presented to the County Planning Commission to demonstrate conformity with the plan; (2) the proposed zoning would not contribute to the general well-being of the neighborhood; (3) the proposed use would be detrimental to the health, safety, and general welfare of persons residing in the vicinity; (4) the true scope, costs, and impact of the development was not accurately and fully communicated to the county officials during the decision-making process; and (5) the costs of the development would substantially exceed $750,000.

To determine whether this affidavit was sufficient to merit a rule 56(f) continuance, several factors must have been considered:

> (1) Were the reasons articulated in the Rule 56(f) affidavit "adequate" or is the *party against whom summary judgment* is sought merely on a "fishing expedition" for purely speculative facts after substantial discovery has been conducted without producing any significant evidence? (2) Was there sufficient time since the inception of the lawsuit for the party against whom the summary judgment is sought to use discovery procedures, and thereby cross-examine the moving party? (3) If discovery procedures were timely initiated, was the non-moving party afforded an appropriate response?

Callioux, 745 P.2d at 841; *see also Reeves*, 764 P.2d at 639; *Downtown Athletic Club*, 740 P.2d at 278.

In determining if Sandy City's request for further discovery was meritorious, we first consider the relevant standard of review. As we noted above, in municipal zoning decisions, the courts do not consider the wisdom, necessity, or advisability of particular actions. *See Sandy City v. City of South Jordan*, 652 P.2d 1316, 1318–19 (Utah 1982). Instead, the reviewing court may consider whether the municipality acted in conformance with its enabling statutes and ordinances pursuant to its comprehensive plan. *Naylor v. Salt Lake City Corp.*, 16 Utah 2d 192, 398 P.2d 27, 28–29 (1965). The court may not substitute its judgment for that of the municipality on the merits of these issues, however. *Id.* at 129.

The trial record contained evidence as to Salt Lake County's enabling statutes, ordinances, and plans. It also indicated that the Salt Lake County Commission considered evidence with respect to all the issues on which Sandy City wished to perform additional discovery. The Salt Lake County Commission made findings of fact going to the merits of these issues.[3] Discovery relating to the merits of the issues was improper under the standard of review, but could properly be held with respect to enabling statutes and procedural issues. However, there was already substantial evidence on the record regarding the relevant enabling statutes and plans. Further, Sandy City did not allege in its affidavit that it needed additional time to discover procedural errors committed by

3. The Salt Lake County Commission findings state, in part:

> 1. The estimated cost of the development is approximately $175,000....
> 2. This development is consistent with the intent of the Salt Lake County Master Plan by placing commercial development at major intersections within the county. The Little Cottonwood District Plan was generally intended to be applicable through 1985 and the map is now outdated in this immediate area. Since the adoption of the plan in 1976, Sandy City rezoned the northeast corner of 10600 South 1300 East to commercial, which changed the character of the intersection. Additional commercial development is now appropriate at this intersection and is consistent with the existing development approved by Sandy City.
> 3. The development will provide additional gasoline services which are needed and desirable in the neighborhood and community....
> 4. The development is buffered from adjacent residential uses by property zoned R-M and will not be detrimental to the health, safety or general welfare of persons residing or working in the vicinity or injurious to property or improvements in the vicinity. The traffic engineer has reviewed and approved the application. Upon compliance with the conditions required by the Planning Commission, the development will be an attractive addition to the community.
> 5. The proposed use will comply with the regulation and conditions of the Zoning Ordinance.

Salt Lake County in granting the conditional building permit. Therefore, we find that the trial court could reasonably conclude that the reasons Sandy City articulated in its affidavit would produce only cumulative evidence and, so, were inadequate to merit a continuance under rule 56(f).

Further, Sandy City had sufficient time and opportunity during the pendency of the action before the county commissions to develop and present evidence in its favor and to determine and refute the defendants' evidence. The record indicates that on August 5, 1987, the Salt Lake County Commission adopted the zoning ordinance allowing commercial development on the property at issue, following hearings on the issue held in April and May of 1987. Sandy City objected to the rezoning at this time but failed to appeal. On August 26, 1987, Postero–Blecker applied for the Chevron conditional use permit. Sandy City protested the application on September 18, 1987, and subsequently was involved in several public hearings on the issue before both the Salt Lake County Planning Commission and the Salt Lake County Commission, at which it had ample opportunity to present evidence. Sandy City appealed to the district court in December 1987. The hearing on the summary judgment motion was finally held on February 5, 1988, nearly a year after the initial zoning hearings had taken place. As stated previously, the court will not use a rule 56(f) motion to shield the movant from his or her lack of diligence.

> Finally, in a rule 56(f) motion,
>
> [t]he mere averment of exclusive knowledge or control of the facts by the moving party is not adequate: the opposing party must show to the best of his ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired information pursuant to discovery procedures under the Rules; and that he is desirous of taking advantage of these discovery procedures.

Callioux, 745 P.2d at 840–41 (quoting 2 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice par. 56.24 (2nd ed. 1987)). Sandy City's affidavit did not comply with these requirements. Therefore, we conclude that the district court did not abuse its discretion in denying Sandy City's rule 56(f) motion.

D. Genuine Issues of Material Fact

Sandy City argues that the court failed to consider evidence which created the following genuine issues of material fact: (1) Sandy City's willingness to annex, as shown by its express declaration in its annexation policy declaration and its attorney's statements before the Salt Lake County Planning Commission; (2) that the projected cost of the Chevron project exceeded $750,000, as shown by a certified appraisal setting the cost as between $660,000 and $760,000; (3) that the Chevron station was only part of a larger scheme to develop the 4.18–acre parcel, in that the Chevron station would take only ⅛ of the parcel, the property owners' represented that the property would be a "commercial subdivision," and that they would be the sole developers of the entire tract; (4) that the cost for the entire development, excluding the cost of the land, would exceed $750,000; and (5) the development was not in compliance with the county master plan and county ordinances which called for rural use of the subject property, and would create traffic hazards and planning problems.

[12] Many of these issues are actually issues of law. The only issues of fact are the projected cost of the project and whether the proposed development was in compliance with the county master plan and county ordinances. As we have noted above, these issues were discussed and evidence was presented before the county commissions, which entered written findings and decided them on their merits. Because their findings were supported by evidence, we do not disturb them on review. *See USX Corp. v. Industrial Comm'n*, 781 P.2d 883, 885–86 (Utah Ct.App.1989) (administrative agency's factual findings will not be disturbed unless they are "arbitrary and capricious").

II. LEGAL ISSUES

We next address Sandy City's contention that the trial court erred in its interpretation and application of Utah Code Ann. § 10–2–418 (1986) and § 10–1–104(11) (1986). Because summary judgment is granted as a matter of law rather than fact, the appellate court is free to reappraise the trial court's legal conclusions. *Bonham v. Morgan*, 788 P.2d 497, 498 (Utah 1989) (per curiam); *Parents Against Drunk Drivers v. Graystone Pines Homeowner's Ass'n*, 789 P.2d 52, 54 (Utah Ct. App.1990); *Western Fiberglass, Inc. v. Kirton, McConkie & Bushnell*, 789 P.2d 34, 35 (Utah Ct.App.1990).

A. Annexation Procedure

Utah Code Ann. § 10–2–418 prohibits urban development "within one-half mile of a municipality in the unincorporated territory which the municipality has proposed for municipal expansion in its policy declaration, *if a municipality is willing to annex the territory proposed* for such development under the standards and requirements set forth in this chapter." (Emphasis added.) The parties disagree as to whether Sandy City, to prevent urban development in the disputed territory, was required under this statute to formally declare its intention to annex the territory prior to the events leading to this lawsuit.

Utah Code Ann. § 10–2–414 (1986) requires a municipality, prior to annexing unincorporated territory of more than five acres, to adopt a policy declaration indicating the standard under which it is willing to annex the territory. Sandy City argues that it expressly declared its willingness to annex the property before initiation of the present lawsuit by (1) promulgating a general policy declaration indicating its willingness to annex the property, if petitioned, along with twenty other parcels; and (2) its counsel's direct statement to the Salt Lake County Planning Commission that it was willing to annex the property. The trial court found that Sandy City was obliged to make a formal declaration of intent to annex, in addition to its general policy declaration, to invoke the protection of section 10–2–414.

[13] Even though Sandy City, in its master policy declaration, had indicated its interest in annexing the property should the property owners so petition, the property owners never petitioned, nor did Sandy City attempt to annex the property on its own. Further, it did not appeal the county's initial zoning decision pursuant to Utah Code Ann. § 10–9–9 (1986), and raise this issue at that time. Instead, it waited to raise the issue on the subsequent grant of the conditional use permit, where the relevant issues do not include the proposed use of the land or any annexation issue, but only whether the proposed use comports with the previously enacted zoning regulations and county master plan. Because Sandy City could and should have raised this issue earlier, we find that it is precluded from raising it now. *See Ringwood v. Foreign Auto Works*, 786 P.2d 1350, 1357 (Utah Ct.App.1990). As such, we do not address the issue of whether Sandy City was required under section 10–2–418, in addition to its master policy declaration, to officially declare its willingness to annex a territory of less than five acres.[4] Consequently, we find Sandy City's objection to be without merit.

We affirm the trial court's finding against Sandy City on this issue, even though we assign a totally different rationale than that used by the trial court. *See, e.g., Ostler v. Ostler*, 789 P.2d 713, 716 (Utah Ct.App.1990).

B. Urban Development

Utah Code Ann. § 10–2–418 (1986) states that "[u]rban development shall not be approved or permitted within one-half mile of a municipality in the unincorporated area which the municipality has proposed for municipal expansion in its policy declaration." "Urban development" is defined in Utah Code Ann. § 10–1–104(11) (1986) as

4. We note that the property at issue consists of 4.18 acres while section 10–2–418 applies to parcels consisting of at least five acres. Therefore, section 10–2–418 would be inapplicable in the present case.

"a housing subdivision involving more than 15 residential units with an average of less than one acre per residential unit or a commercial or industrial development for which cost projections exceed $750,000 for any or all phases."

Pursuant to its objective of preventing the proposed development of the disputed territory, Sandy City argues that the trial court erred in finding the value of the proposed development did not exceed $750,000 because (1) the definition of "urban development" under section 10–1–104 includes not only the value of the building itself, but also the cost of the land and the value of the building fixtures; and (2) the $750,000 figure encompasses all commercial ventures to be built on the disputed territory. Salt Lake County, on the other hand, alleges that the only relevant cost under the definition is that of the building alone and does not include the land and building fixtures, and that the $750,000 figure applies to each individual development venture separately initiated on the property.

[14] Again, because Sandy City has not made any attempt to annex the territory and should have raised its objections to urban development at the time of the zoning determination rather than at the subsequent granting of a conditional use permit, we decline to interpret this statute. Because the interpretation of section 10–2–414 would have no relevance to the propriety of the county's grant of a conditional use permit under our standard of review, any interpretation we would make would be an advisory opinion, which we decline to issue under well established standards of judicial review. *See Ringwood v. Foreign Auto Works, Inc.*, 786 P.2d 1350, 1357 (Utah Ct.App.1990) (where the result in the prior action constitutes the full relief available to the parties on the same claim, or where the issue could and should have been litigated in the prior action, the claim is precluded under the doctrine of res judicata); *Reynolds v. Reynolds*, 788 P.2d 1044, 1045 (Utah Ct.App.1990) (there is a long-standing judicial policy in Utah to avoid advisory opinions). Therefore, we find this issue to be without merit.

JACKSON, J., concurs.

BENCH, J., concurs in the result.

APPENDIX "C"

FILED IN CLERK'S OFFICE
Salt Lake County Utah

MAR 15 1988

H. Dixon Hindley Clerk 3rd Dist Court
By _____ Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SANDY CITY, a municipal corporation of the State of Utah,	:	MEMORANDUM DECISION
	:	CIVIL NO. C-87-7304
Plaintiff,	:	
vs.	:	
SALT LAKE COUNTY, a political subdivision of the State of Utah, et al.,	:	
	:	
Defendants.	:	

Plaintiff's and defendants' Motions for Summary Judgment came before this Court on the 5th day of February, 1988. All parties were represented by respective counsel. After argument, the Court took the matter under advisement. On the 25th day of February, 1988, Salt Lake County's Motion for Certification of Record came before this Court. The matter was taken under advisement, subject to plaintiff supplementing the record. After reviewing the file, Memoranda, record and arguments, the Court finds as follows.

1. Salt Lake County Commission acted properly in rezoning the property in question, and was not in violation of any county ordinance or county master plan, and did not act arbitrarily and capriciously. Furthermore, Sandy City appears to have waived its right to object to rezoning.

2. Salt Lake County Planning Commission and Salt Lake County Commission properly issued a conditional use permit for development of the subject property. The project, based on the facts, is necessary and desirable, and not detrimental to the general welfare. Furthermore, the defendant Chevron Incorporated acted properly in processing its application through the only body with jurisdiction at the time, Salt Lake County. Sandy City did not have jurisdiction to accept the application.

3. Defendants' actions do not violate Utah Code Ann., Section 10-2-418.

(a) Defendants' development does not constitute "urban development" proposed within a restricted, unincorporated area.

(b) Sandy City has not clearly stated it would annex the subject property, but only that it will consider annexation. It was not until the present lawsuit was filed that it indicated that it would annex the subject property. Even if Chevron petitioned for annexation and Sandy City annexed, there is no assurance Sandy City would approve Chevron's application. Furthermore, Chevron is not required to petition Sandy City for annexation.

(c) The value of the fixtures and personal property should not be considered. The projected cost of the proposed service station project is under $750,000.00. Furthermore, the application of Chevron should be considered a single development.

(d) Even if Chevron's application were not considered a single development, and were combined with McDonald's project, the project will still not exceed $750,000.00.

(e) At this time Chevron has taken all the necessary procedures for approval of their application, and is ready to proceed with their project.

4. Based on the facts before the Court, it appears that Salt Lake County Commission has conducted a hearing that comported with all due process requirements. It appears to have acted within the scope of its authority, has conducted hearings, and arrived at a decision, and does not appear to have acted in excess of its authority, or in a manner so clearly outside reason that its action must be deemed capricious and arbitrary. Peatross v. Board of Commissioners of Salt Lake City, 555 P.2d 281 (1976).

5. Accordingly, it is the opinion of this Court that Sandy City's Motion to Strike should be denied, and Sandy City's Motion for Summary Judgment should be denied. Furthermore, all of the defendants' Motions for Summary Judgment and Salt Lake County's Motion for Certification should be granted. Counsel for defendant Chevron is to prepare an Order for the Court's

signature. Said Order should be approved as to form by all parties.

Dated this 15TH day of March, 1988.

RAYMOND S. UNO
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
Clerk
By
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 15th day of March, 1988:

Walter R. Miller
Attorney for Plaintiff
440 East 8680 South
Sandy, Utah 84070

Kent S. Lewis
Deputy County Attorney
Attorney for Salt Lake County Defendants
2001 S. State, Suite S3600
Salt Lake City, Utah 84190-1200

Leonard J. Lewis
John W. Andrews
Attorneys for Defendant Chevron
50 S. Main, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145

Brinton R. Burbidge
Attorney for Defendants Yeates, Priest,
Kjar and Smoot
330 South 300 East
Salt Lake City, Utah 84111-2599

FILED IN CLERK'S OFFICE
Salt Lake County Utah
APR 8 1988
H. Dixon Hindley, Clerk 3rd Dist. Court
By _____ Deputy Clerk

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Leonard J. Lewis, #1947
John W. Andrews, #4724
Attorneys for Chevron USA, Inc.
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

SANDY CITY, a municipal corporation of the State of Utah, Plaintiff, vs. SALT LAKE COUNTY, a political subdivision of the State of Utah, SALT LAKE COUNTY PLANNING COMMISSION, K. DELYN YEATES, R. SCOTT PRIEST, W. SCOTT KJAR, STEVEN E. SMOOT, POSTERO-BLECKER, INC., and CHEVRON U.S.A., INC., Defendants.	ORDER AND JUDGMENT OF DISMISSAL Civil No. C87-7304 Honorable Raymond Uno

The following matters came on for hearing before the Honorable Raymond S. Uno, District Judge, on Friday, the 5th day of February 1988, at 2:00 p.m.: (1) Defendant Chevron U.S.A., Inc.'s Motion For Summary Judgment; (2) Defendants Salt Lake County and Salt Lake County Planning Commission's Motion For Summary Judgment; (3) Defendants Smoot, Kjar, Priest and Yeates' Motion For Summary Judgment; (4) Plaintiff Sandy City's

Motion For Summary Judgment; and (5) Plaintiff Sandy City's Motion To Strike. Leonard J. Lewis and John W. Andrews appeared on behalf of defendant Chevron U.S.A., Inc.; Kent S. Lewis appeared on behalf of defendants Salt Lake County and Salt Lake County Planning Commission; Brinton R. Burbidge appeared on behalf of defendants Smoot, Kjar, Priest and Yeates; and Walter R. Miller appeared on behalf of plaintiff Sandy City.

The Court having reviewed the record and the memoranda and arguments of the parties, and good cause appearing, it is hereby ORDERED, ADJUDGED and DECREED as follows:

(1) Plaintiff Sandy City's Motion For Summary Judgment and Motion To Strike are denied;

(2) It appearing that no material issues of fact exist, and that defendants are entitled to judgment as a matter of law, defendants' Motions For Summary Judgment are hereby granted. It is hereby ordered that the Verified Complaint of Sandy City in this action and all causes of action contained therein be stricken, and this action be and hereby is dismissed with prejudice.

DATED this 15th day of April, 1988.

ATTEST
H. DIXON HINDLEY
Clerk
By _____
Deputy Clerk

BY THE COURT:

Raymond S. Uno
District Judge

000266

APPROVED AS TO FORM:

VAN COTT, BAGLEY, CORNWALL
& McCARTHY
Leonard J. Lewis, Esq.
John W. Andrews, Esq.
Attorneys for Defendant
Chevron U.S.A.,Inc.
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Kent S. Lewis, Esq.
Deputy County Attorney
Attorney for Salt Lake County
Defendants
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Brinton R. Burbidge, Esq.
KIRTON, McCONKIE & BUSHNELL
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330 South 300 East
Salt Lake City, Utah 84111

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APPENDIX "D"

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH
FEB 4 4 23 PM '88
IN DEPUTY CLERK
Connie Petrogeorge

Walter R. Miller, #2268
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440 East 8680 South
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Telephone: (801) 566-1561

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

SANDY CITY, a municipal corporation, Plaintiff, vs. SALT LAKE COUNTY, political subdivision of the State of Utah, SALT LAKE COUNTY PLANNING COMMISSION, K. DELYN YEATES, R. SCOTT PRIEST, W. SCOTT KJAR, STEVEN E. SMOOT, POSTERO-BLECKER, INC., and CHEVRON U.S.A. INC., Defendants.	:	AFFIDAVIT OF WALTER R. MILLER Civil No. C87-07304 Honorable Raymond S. Uno

---

STATE OF UTAH)
: ss
County of Salt Lake)

WALTER R. MILLER, being first duly sworn upon oath, deposes and says:

1. He is the duly appointed City Attorney for Sandy City (hereinafter "City") and has held this position since May 1, 1986. Affiant has practiced as an attorney and a member of the Utah State Bar since 1972. Previous to his appointment as City Attorney, affiant has served in several public positions

including staff attorney for the U.S. Department of Justice, Washington, D.C. and Deputy City Attorney (Chief of the Civil Division) for Salt Lake City Corporation.

2. Affiant's duties as City Attorney include representation of the City in legal actions against it. In this capacity, affiant serves as counsel of record for the City in the above-entitled action.

3. By letter dated November 19, 1987, affiant inquired of Defendant's counsel, as to a convenient date for Defendant K. Delyn Yeates' deposition. Defendant's counsel did not respond to that inquiry. A copy of affiant's letter of inquiry is attached hereto as Exhibit A.

4. Affiant has been informed that some information sought by the City in this action will eventually be made a public record, which will be available for the City informally and outside of regular discovery process. One such document, minutes of the County Commission meeting of December 9, 1987, contains information as to the scope, costs and impact of development of the property, which is critical to the City's case. Affiant has twice sought a certified copy of such minutes for court purposes but has been informed by the County Commission Clerk that the minutes have not yet been approved by the County Commission. The clerk informed affiant that the minutes are not scheduled for approval until February 8, 1988.

5. Aside from discovery from other parties, the City has initiated study and public review of appropriate

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development which relate to this action and have invited Defendants to participate in this review. Such study and review is currently underway but has not yet been completed. Affiant believes such study and review will produce information vital to prosecution of this action.

6. Discovery by the City is incomplete in this action and affiant is of the opinion, based on information and belief, that information sought in discovery will create genuine issues of material fact sufficient to defeat Defendants' motions for summary judgment, including but not limited to the following:

a. That zoning and proposed uses for the property contradict the County master plan and that insufficient evidence was presented to the County Planning Commission to demonstrate conformity with that plan, as required by County ordinance.

b. That the proposed zoning and use is unnecessary or undesirable or will not contribute to the general well-being of the neighborhood and community and that evidence concerning such subjects was not appropriately presented by Defendants to County officials, as required by County ordinance.

c. That the zoning and proposed uses will be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity, and that evidence of such

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matters was not appropriately presented to County officials as required by ordinance.

d. That the true scope, costs and impact of development, in all phases, for the property, including but not limited to land acquisition and improvement, financing, general construction, fixturing, development fees and service connections, as known to Defendant developers, were not fully and accurately communicated to County officials during the decision-making process.

e. That Defendants' "commercial subdivision" was not platted and approved as required by state statute and that all evidence will be consistent in demonstrating that the costs of development of that subdivision substantially exceed $750,000.

7. The document attached hereto as Exhibit "B" is a true and correct copy of objections filed with Salt Lake County, by affiant on behalf of the City.

DATED this 4th day of February, 1988.

Walter R. Miller
City Attorney

SUBSCRIBED AND SWORN to before me this 4th day of February, 1988.

Notary Public, Residing in
Salt Lake County, Utah

My Commission Expires:
6-10-91

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EXHIBIT A

November 19, 1987

Brinton R. Burbidge
Kirton, McConkie & Bushnell
330 South 300 East
Salt Lake City, Utah 84111

Re: Sandy City v. Salt Lake County
Civil No. C 87-07304

Dear Mr. Burbidge:

Thank you for your telephone call last Tuesday, informing me of your representation of the property owners in the above action and inquiring as to whether a meeting of our clients would be helpful in resolving this dispute. I regret that we have been unable to catch each other by telephone since that time.

I wish to confirm my statement to you during our earlier conversation that I do think that a meeting would be useful as a step in resolving some of the complaints we discussed frankly by phone. I have proposed such a meeting to several Sandy City officials and they agree that discussion could be productive.

Of course, I do not mean to imply by this letter that a decision on annexation or zoning will be made in an informal meeting with your clients. As you are aware from your representation of public entities, statutes govern the means by which such issues are determined, which means generally involve notice and public hearing. Nevertheless, recommendations can be formulated through informal discussions which can be of significant influence on the decision-making process.

We sincerely solicit your contribution to these processes. Please let us know of any interest your clients may have in further discussion.

With regard to the legal action, the City is interested in taking the deposition of Mr. K. Delyn Yeates, preferably within the next two weeks. Please let me know if there is a convenient time Mr. Yeates could be made available for this purpose.

Very truly yours,

Walter R. Miller
City Attorney

EXHIBIT B

In the Matter of a Conditional Use Applications for a Chevron Service Station and McDonald's Outlet located at 10600 South 1300 East	:	OBJECTION TO PROPOSED FINDINGS P1-87-2177/87-2214

Sandy City ("City") hereby objects to the proposed findings of the Salt Lake County Planning Commission ("Commission") in the captioned conditional use applications. Such objection is based upon the following:

1. Proposed Finding No. 1 is erroneous in that estimates the cost of development without considering land costs or all phases of development and without basing such estimate on competent evidence. Such finding is also faulty in that it narrowly and erroneously construes the requirements of 10-2-418 Utah Code Anno. 1953, which requires the applicant to apply for annexation as a condition of development and which prohibits the Commission from approving or permitting applicant's development request when the City is willing to annex. Such construction is directly contrary to 10-1-102, Utah Code Anno. 1953, which provides that powers of Cities are to be liberally construed to permit municipalities to exercise their annexation powers.

2. Subsection D of County Ordinance 19.84.090 provides that the applicant's conditional use must be denied unless evidence is presented to the Commission which establishes that the proposed use conforms to the intent of the county master plan. Proposed Finding No. 2 is erroneous in that it (a) implies that the proposed use is in conformity with the master plan,

whereas the use expressly contradicts such plan; (b) implies that the Commission has authority to ignore such plan and County Ordinance 19.84.090 because the Commission considers the master plan to be "outdated;" and (c) makes conclusions of a factual nature which were not presented as evidence to the Commission, which are contrary to testimony before the Commission, and which are inconsistent with determinations made by the Commission prior to and subsequent to its approval of the applicant's use.

3. Subsection A of County Ordinance 19-84-090 requires that applicant's use must be denied unless evidence is presented which establishes that the proposed use is necessary or desirable to provide a service or facility which will contribute to the general well-being of the neighborhood and the community. Proposed Finding No. 3 erroneously suggests that the Commission considered such issue, took evidence thereon, and thereafter concluded that additional gasoline services were necessary; whereas, no such evidence was presented to the Commission and had the Commission considered this issue, a general community benefit not have been shown for reasons more fully set forth in the City's appeal from the Commission's decision in this matter ("City's Appeal").

4. Subsection B of County Ordinance 19-84-090 requires that the use cannot be authorized unless evidence is presented which establishes that the use will not be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity. Proposed Finding No. 4 erroneously concludes that no

detriment will inure to the community from the development, which conclusion incorrectly implies that such issue was considered and evidence was taken by the Commission on this matter and ignores the protests and concerns of both the City and many area residents. Many of such concerns are more fully set forth in the City's Appeal.

5. Proposed Finding No. 5 concludes that the proposed use will comply with the regulation and conditions of the Zoning Ordinance. Such finding is erroneous in that the Commission's approval directly violates County Ordinance 19.84.090, as more fully set forth above.

DATED this 12th day of November, 1987.

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